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tatus: GRANTED

Title: Three Affiliated Tribes of the Fort Berthold
Reservation, Petitioner
V.
Wold Engineering, et al.

ocketed:
une 20, 1985

Court: Supreme Court of North Dakota

Counsel for petitioner: Holm, John O., Cross, Raymond

Counsel for respondent: Lee, Gary H.

ntry	Date	Note	Proceedings and Orders
1	Jun 20 1985	G	Petition for writ of certiorari filed.
2	Jul 22 1985		Brief of respondent Wold Engineering in opposition filed.
3	Jul 24 1985		DISTRIBUTED. September 30, 1985
5	Oct 7 1985		REDISTRIBUTED. October 11, 1985
6	Oct 15 1985		Petition GRANTED. *****
7	Nov 7 1985		Record filed.
9	Nov 18 1985		Order extending time to file brief of petitioner on the merits until December 9, 1985.
10	Dec 6 1985		Joint appendix filed.
11	Dec 6 1985		Brief of petitioner Three Affiliated Tribes of Fort Berthold Reservation filed.
12	Dec 9 1985	G	Motion of Standing Rock Sioux Tribe, et al. for leave to file a brief as amici curiae filed.
13	Dec 9 1985	G	Motion of Turtle Mountain Band of Chippewa Indians for leave to file a brief as amicus curiae filed.
15	Dec 11 1985		Brief amicus curiae of North Dakota filed.
16	Jan 8 1986		Brief of respondent Wold Engineering filed.
17	Jan 13 1986		Motion of Standing Rock Sioux Tribe, et al. for leave to file a brief as amici curiae GRANTED.
18	Jan 13 1986		Motion of Turtle Mountain Band of Chippewa Indians for leave to file a brief as amicus curiae GRANTED.
19	Feb 4 1986		SET FOR ARGUMENT, Monday, March 24, 1986. (1st case).
20	Feb 4 1986		CIRCULATED.
21	Mar 24 1986		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

84-1973
No. _____

Supreme Court, U.S.
FILED

JUN 20 1985

ALEXANDER L. STEVAS
CLERK

In The
Supreme Court of the United States
October Term, 1984

—○—
THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,

Petitioner,

vs.

WOLD ENGINEERING, P.C., and
SCHMIDT, SMITH & RUSH,

Respondents.

—○—
**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA**

—○—
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state may enact a statute, consistent with the equal protection and due process clauses of the Fourteenth Amendment, barring tribal plaintiffs from access to state court in circumstances where non-Indian plaintiffs may clearly maintain such actions.

2. Whether a state may require, consistent with governing federal Indian law, an Indian tribe to waive its immunity from state civil jurisdiction, for all cases, as a condition for bringing a damages action against a non-Indian engineering firm in state court.

PARTIES TO ACTION

The parties to this proceeding are the Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner; Wold Engineering, P.C., a North Dakota professional corporation, Respondent; and Schmidt, Smith & Rush, Respondents.

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In The
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THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,

Petitioner,

vs.

WOLD ENGINEERING, P.C., and
SCHMIDT, SMITH & RUSH,

Respondents.

—○—

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA**

—○—

The Three Affiliated Tribes, a federally recognized Indian tribe, petitions for a writ of certiorari to review the judgment of the North Dakota Supreme Court.

—○—

OPINIONS BELOW

The judgment of dismissal of petitioner's damages action against Wold Engineering by Judge Berning of the Northwest Judicial District for North Dakota, Civil No. 46392, is an unreported decision. The judgment of the North Dakota Supreme Court affirming the state district court's dismissal of petitioner's action is reported at 321 N.W.2d 510 (1982). The opinion of this Court, vacating the decision of the North Dakota Supreme Court and remanding the case for further proceedings, is reported at 104 S.Ct. 2267. The opinion of the North Dakota Supreme Court, vacating its previous opinion of July 1, 1982, and modifying the district court's judgment, is reported at 364 N.W.2d 98 (1985) (App. A, *infra* 1a-23a).

JURISDICTION OF THIS COURT

Jurisdiction of this Court to review the North Dakota Supreme Court's decision in this matter is conferred by 28 U.S.C. § 1257(3). The opinion of the state court was filed on March 13, 1985 (App. A, *infra* 1a-24a). A petition for rehearing was denied on April 1, 1985 (App. C, *infra* 32a-38a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in the Appendices:

Federal: U.S. Const., amend, XIV, § 1; Sections 402(a), 404 and 406 of Pub. L. 90-284, 82 Stat. 629, now codified at 25 U.S.C. §§ 1322, 1324, and 1326 (1983); Section 16 of R.S. § 1977, 16 Stat. 144, now codified at 42 U.S.C. § 1981; and Section 1 of R.S. § 1979, 17 Stat. 13, *as amended* by Pub. L. 96-170, 93 Stat. 1284, now codified at 42 U.S.C. § 1983 (1981).

State: N.D. Const., Art. I, § 9; N.D. Cent. Code, Chapter 27-19, "Indian Civil Jurisdiction Act."

STATEMENT OF THE CASE

In 1963, the North Dakota legislature enacted a special statutory jurisdictional requirement, applicable to Indians only, as Chapter 27-19 of the North Dakota Century Code and entitled the Indian Civil Jurisdiction Act. That statute has been read by the court below as requiring tribal governments to waive their immunity from state court civil jurisdiction for all cases as a condition for bringing an on-reservation damages action against a non-Indian engineering firm in state court. The state court also read that statute as barring all tribal plaintiffs from state court in these circumstances until they comply with Chapter 27-19. 364 N.W.2d 98 (1985) (App. A, *infra* 1a-24a).

I.

Prior History Of This Case Before This Court

This case concerns an action for damages brought in state district court by the Three Affiliated Tribes, a federally-recognized Indian tribe, against a non-Indian engineering firm. This case arose on the Fort Berthold Reservation in North Dakota. That reservation had been set aside for the use and occupancy of the Mandan, Hidatsa, and Arikara Tribes by the Act of March 3, 1891, 26 Stat. 1032. See *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972).

The Three Tribes contracted in 1974 with respondent, Wold Engineering Company (hereinafter "Wold"). Wold is a professional corporation organized under the laws of North Dakota and has its principal office off-reservation in Bottineau, North Dakota. Wold was employed by petitioner to design a public works project on the Fort Berthold Indian Reservation. The purpose of this project, known as the Four Bears Water System Project, was to provide a continuous, safe, and secure domestic water supply source to serve the needs of a portion of the reservation populace. This was to be accomplished by diverting water from Lake Sakakawea through an intake structure and pump system.

Respondent undertook the project and had installed a submersible pump, built to its design specifications, on a pier of the Four Bears Bridge that crossed the Lake. That system was completed on July 29, 1977. However, that system was subject to continual failure and despite several attempts at correction by respondent, the system

has never delivered a continuous supply of water as was contemplated by the project's purpose.

Petitioner (hereinafter "Tribe") commenced a negligence and breach of contract action against Wold on March 20, 1980 in state court. Wold moved to dismiss this action at trial on the grounds that the state court lacked subject-matter jurisdiction, as a matter of federal law, over the case since it arose on an Indian reservation. Wold's motion was granted by the trial judge on January 11, 1982. The state court's judgment of dismissal appears at Appendix A of Petitioner's prior Petition for Certiorari on file with this Court. On February 23, 1982, petitioner filed its Notice of Appeal to the Supreme Court of North Dakota (Orig. Pet. 2a).

The North Dakota Supreme Court on July 1, 1982, relying on the Tribe's lack of consent under Chapter 27-19 and the state legislature's authority under Public Law 280 to adopt such a jurisdictional statute, affirmed the state district court's dismissal for want of subject-matter jurisdiction of the Tribe's action for damages against the non-Indian engineering firm. 321 N.W.2d 510 (1982) (Orig. Pet. 3a-10a).

This Court granted the Three Affiliated Tribes' Petition for Certiorari. 103 S.Ct. 1872 (1983). The Court decided that the state court's decision in this matter should be vacated and the case remanded to the lower court for further proceedings not inconsistent with this Court's opinion. 104 S.Ct. 2267 (1984), *vacating and remanding*, 321 N.W.2d 510 (1982).

Justice Blackmun, writing for the majority of this Court, considered that disposition especially appropriate

in light of the state court's earlier decision establishing the right of tribal Indians to access to North Dakota courts and the existence of state subject-matter jurisdiction over tribal plaintiffs' claims against non-Indians arising on reservations as a matter of state law. 104 S.Ct. at 2275. The state court, on remand, was to assess the jurisdictional effect of Chapter 27-19 knowing that, in the light of this Court's opinion:

(1) Chapter 27-19 did not represent either a federally-authorized state legislative disclaimer or bar of state court jurisdiction under Public Law 280 over tribal plaintiffs' damages claims, arising on reservation, against non-Indian defendants; and,

(2) Chapter 27-19 was not insulated by operation of federal law from state and federal constitutional scrutiny. 104 S.Ct. at 2277.

II.

History Of This Case On Remand To The North Dakota Supreme Court

The North Dakota Supreme Court, on March 13, 1985, decided that Chapter 27-19, as a matter of state law alone, barred tribal plaintiffs' from state courts until they consented to state civil jurisdiction and waived their immunity to general civil liability in state court under the terms of that statute. 364 N.W.2d 98 (1985) (App. A, *infra* 7a-8a).

Chapter 27-19 was construed by the state court as having terminated any pre-existing right to sue non-Indians in state courts that tribal plaintiffs may have claimed under the jurisdictional principles declared in *Vermillion*

v. Spotted Elk, 85 N.W.2d 342 (N.D. 1957) (App. A, *infra* 8a). Tribal Indian plaintiffs, the court decided, will have access to state courts in reservation-based damages actions against non-Indians only upon compliance with the terms of Chapter 27-19. *See* § 27-19-02, (App. B, *infra* 28a). However, the court also held that individual tribal Indians, including tribal governments, may have access to state courts to sue non-Indians in these circumstances if they comply with Section 27-19-05 of the statute (App. B, *infra* 8a). The Tribe's consent to state civil jurisdiction, filed with the county auditor where the Indian resides, would subject it to general civil liability in state court for all cases. § 27-19-13, N.D.C.C. (App. B, *infra* 31a).

Further, such consent will subject the tribal Indian to state jurisdiction in the following categories, but shall not be limited to them: (1) determination of parentage of children; (2) termination of parental rights; (3) commitments by county mental health boards or county judges; (4) guardianship; (5) marriage contracts; and, (6) obligations for the support of spouse, children, or other dependents. § 27-19-08, N.D.C.C. (App. B, *infra* 29a-30a).

The state court, characterizing Chapter 27-19 as protective and benign state legislation that favors tribal Indians residing on federal reservations in the state, upheld the statute against the Tribe's federal statutory and constitutional attack on its validity (App. A, *infra* 8a-15a). The state court also upheld the constitutionality of Chapter 27-19, although the statute excludes thousands of tribal plaintiffs, admittedly citizens and residents of North Dakota, from state courts in these circumstances (App. A, *infra* 15a). The state court, stating that it was relying en-

tirely on Chapter 27-19 as an adequate and independent state ground for its decision, decided that the statute required and permitted the dismissal of tribal plaintiffs' damages actions against non-Indians in these circumstances (App. A, *infra* 16a-17a).

The state court, in light of its decision allowing individual compliance with Chapter 27-19, vacated its earlier opinion in this matter, modified the district court's judgment and remanded the case for further proceedings. The Three Affiliated Tribes filed its Petition for Rehearing in this matter on March 27, 1985 (App. C, *infra* 32a-37a). The state court denied that petition on April 1, 1985. The state court has entered two orders, on March 21 and April 1, 1985, respectively, modifying page 7 of its opinion in this matter. Petitioner filed its Motion to stay the Entry of Mandate by the State Court for the purpose of seeking judicial review by this Court on April 22, 1985. The state court granted that motion on April 22, 1985.

REASONS FOR GRANTING THE WRIT

This case squarely presents the important constitutional issue, left undecided by this Court in its earlier decision in this matter, of whether a state may by statute bar tribal plaintiffs from access to state courts in circumstances where non-Indian plaintiffs may clearly maintain such actions. *Three Affiliated Tribes v. Wold Engineering*, 104 S. Ct. 2267 (1984), *vacating and remanding*, 321 N.W.2d 570 (N.D. 1982). Furthermore, this case raises the issue of whether a state may require an

Indian tribe to waive its immunity from state civil jurisdiction in all cases as a condition for its maintaining a damages action against a non-Indian firm in state court. Additionally, the decision below seriously misconstrues this Court's decision in this matter by reading it to approve the state's imposition of such a requirement as consistent with governing federal law. This required consent would also serve as the basis for state acquisition of civil jurisdiction in categories of subject matter now reserved exclusively to the Indian tribes and the federal government. *See* § 27-19-08 N.D.C.C. (App. B, *infra* 29a-30a).

I.

The Exclusion Of Tribal Plaintiffs From Access To State Court, In Circumstances Where Non-Indian Plaintiffs May Clearly Maintain Such Actions, Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment.

The North Dakota Supreme Court, on remand, has affirmed the state legislative exclusion of all tribal Indian plaintiffs from North Dakota courts for damages actions against non-Indian defendants based on claims arising on an Indian reservation within the state. *Three Affiliated Tribes v. Wold Engineering*, 364 N.W.2d 98 (1985) (App. A, *infra* 1a-23a). This unprecedented ruling curtails a basic civil liberty, that of equal access to state court, of thousands of tribal Indians residing on the federal reservations in the state until they consent to extensive state civil jurisdiction over their person and property (App. A, *infra* 7a-8a). Tribal Indians, prior to 1963, were guaranteed access to state courts for state-created remedies, against non-Indians. *See Vermillion v. Spotted Elk*,

85 N.W.2d 432 (N.D. 1957). The fact that the plaintiff in *Vermillion* was a tribal Indian residing on a reservation within the state was rendered a legally irrelevant factor that bore no relationship to the tribal plaintiff's right of equal access to state court. See N.D. Const., art. I, § 9 (App. B, *infra* 27a) (state courts shall be open to all men for wrongs done to them or their property).

This Court has likewise held that the fact of tribal membership or residence on a reservation is generally irrelevant to tribal Indians' exercise of their civil liberties as citizens and residents of the states in which they reside.¹ *Apache County v. United States*, 429 U.S. 876 (1976), *aff'g sub nom. Goodluck v. Apache County*, 417 F. Supp. 13 (D. Az. 1975) (Three Judge Court) (reservation Indians, as citizens of the United States and of Ari-

¹State exclusions of Indians from state rights and benefits because of the Indians' unique status under federal law or their residence on federal reservations have been uniformly struck down in both state and federal courts. See, e.g., *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) (state statute restricting the right of reservation Indians to vote for county officers struck down as violative of the equal protection clause of the Fourteenth Amendment); *Arizona ex rel Arizona State Board of Public Welfare v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954) (state welfare plan restricting benefits of tribal Indians residing on reservation within the state disapproved by federal government); *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975) (Three Judge Court); *aff'd sub nom Apache County v. United States*, 429 U.S. 876 (1976) (reservation Indians, as citizens of the United States and of Arizona, are entitled to the reapportionment of the county supervisorial districts according to population); *Shirley v. Superior Court*, 109 Ariz. 510, 513 P.2d 939 (1973), *cert. denied*, 415 U.S. 917 (1974) (fact that reservation Indian is immune from service of civil process and is not a taxpayer is no bar to his holding county office); *Acosta v. San Diego County*, 126 Cal. App. 2d 455, 272 P.2d 92 (1954) (indigent reservation Indians, as state citizens, are entitled to direct county relief).

zona, are entitled to the reapportionment of the county supervisorial districts according to population).

However, the North Dakota legislature enacted in 1963 a special statutory jurisdictional requirement applicable to tribal Indians only, and entitled the Indian Civil Jurisdiction Act.² This statute, Chapter 27-19 of the North Dakota Century Code, made the fact of tribal membership and residence on a reservation determinative of Indians' future access to state court. The state court below held that Chapter 27-19 terminated tribal Indians' preexisting right of access to state court to sue non-Indians on damages claims arising on reservation until they comply with the state statute (App. A, *infra* 7a-8a). Further, the state court below held that North Dakota is entitled to withhold access to state courts in these circumstances until the affected Indians consent to state civil jurisdiction in other, unrelated subject matter areas, as defined by the terms of the state (App. A, *infra* 12a-13a).

The state court, characterizing the state legislative purpose behind the enactment of Chapter 27-19 as protective and benign in nature, upheld that statute against petitioner's contention that it subjected a discrete class of state citizens—tribal Indians residing on federal reservations—to constitutionally impermissible, disadvantaged treatment regarding a fundamental civil liberty (App. A, *infra* 8a-15a).

This Court has, on occasion, approved ethnically or racially based state legislation that is intended to en-

²This case involves only state action, not authorized federal action under Public Law 280. *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct. 2267 (1984).

hance a distinct minority's access to state political or educational processes so as to minimize the consequences of racial discrimination. See *United Jewish Organization v. Carey*, 430 U.S. 144, 165 (1977) (this Court upheld a state reapportionment plan that increased the size of certain non-white minorities in certain voting districts against an equal protection challenge because the state legislative purpose was to enhance the opportunity for the election of non-white representatives from those districts); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (this Court, while affirming the judicial invalidation of a university's special admissions program for minorities, reversed the lower court's judgment insofar as it prohibited petitioner from taking race into account as a factor in its future admissions decisions).

Such state legislation, however, is subject to heightened judicial scrutiny to make sure that it does not in practice fence the minority out of the state controlled processes or represent a racial stigma. See *Carey*, 430 U.S. at 167. Further, such state legislation, ostensibly benign in purpose, is still inherently suspect and is subject to the most exacting judicial examination. *Bakke*, 438 U.S. at 291 (all legal restrictions which curtail the civil rights of a single racial group are immediately suspect).

Chapter 27-19, as construed by the state court, applies exclusively to a discrete minority—tribal Indians—and restricts their exercise of a fundamental civil liberty—access to state court.³

³Access to courts is a fundamental constitutional right. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S.

(Continued on following page)

Application of the three-pronged analysis, developed by Justice Brennan in his concurrence in part in *Carey*, to Chapter 27-19 lays bare why this statute is constitutionally bad. *Carey*, 430 U.S. at 172-176.

First, Chapter 27-19 in fact results in the disadvantaged treatment of its supposed beneficiaries by excluding them alone from access to state court in circumstances where non-Indians would clearly be entitled to maintain such actions. See *North Dakota ex rel. Moug v. North Dakota Automobile Assigned Claims Plan*, 341 N.W.2d 623, 626 (N.D. 1983) (a non-Indian assignee of a tribal Indian's personal injury claim arising on a reservation may sue a non-Indian entity in state court, even though the Indian assignor may not maintain the action. The dissent would have held that the action was barred because the tribal assignor could not have maintained the action against a non-Indian in these circumstances).

(Continued from previous page)

508, 510 (1972) (the right of access to court is one aspect of the right to petition protected under the First Amendment); *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 263 U.S. 544, 551 (1923) (the right of access to state court is protected by the Equal Protection and Due Process clauses of the Fourteenth Amendment); *Chambers v. Baltimore & Ohio Railroad Company*, 207 U.S. 142, 148 (1907) (the right to sue and defend in courts is a basic constitutional right).

State interference with this right of access violates the federal civil rights statutes enacted under the authority of the Fourteenth Amendment. *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1972) (access to courts must be meaningful and effective; state interference with that right of access gives rise to a claim under 42 U.S.C. § 1983); *Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963) (reasonable access to state court is preservative of all other rights).

Second, Chapter 27-19 stigmatizes a discrete racial or ethnic group—tribal Indians—that had been prior to 1963, legally indistinguishable from any other plaintiff in this category of actions. *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957). Individual tribal Indians are now called upon to bear a state legislative burden unrelated to their status as citizens and residents of North Dakota.⁴ See *Regents of University of California v. Bakke*, 438 U.S. 265, 298 (1978) (nothing in the Constitution supports the proposition that individuals may be made to suffer otherwise impermissible burdens in order to fulfill a state legislative policy directed at the ethnic group of which they are a member.)

This Court has struck down analogous state legislative burdens that impede the exercise of fundamental rights, similar to access to state court, by a substantial class of citizens. *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (this Court struck down a state statute that denied the franchise, on a selective basis, to residents); *Harper v. Virginia Board of Elections*, 393 U.S. 668 (1966) (this Court struck down a \$1.50 poll tax enacted as a condition for voting in state elections because it had the effect of denying the vote to some citizens); *Douglas v. California*, 372 U.S. 353 (1963) (this Court required states to furnish indigent criminal appellees with legal counsel); *Griffin v. Illinois*, 351 U.S. 12 (1956) (this Court required states to administer the appellate court process regarding review of criminal convictions in a way

⁴States, unlike the federal government, do not enjoy a unique legal relationship with tribal Indians that enables them to disregard their equal protection and due process rights. *Washington v. Yakima Indian Nation*, 463 U.S. 439 (1979).

that gave “adequate and effective access” to such processes).

Further, disabling tribal Indians from suing non-Indians in state court for state-created remedies does not protect them. It renders them vulnerable to substantial wrongs and intrusions by non-Indians. This Court has recognized that access to courts is an important feature of federal policy that enables Indians to protect their property and rights against such intrusions. See *Three Affiliated Tribes v. Wold Engineering*, 104 S. Ct. at 2274; *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370-371 (1968); *Creek Nation v. United States*, 302 U.S. 618 (1938).

Third, the Court below gives the impression, in its opinion, that it was the tribal Indians who asked for an ostensibly protected status under Chapter 27-19. Insofar as the scanty legislative record of Chapter 27-19 goes, the tribal Indian leaders uniformly opposed the enactment of any special state legislation, protective or otherwise, over the Indian reservations in North Dakota.

Chapter 27-19 is perceived as unjust by non-Indians and Indians alike. This perception of injustice engendered by Chapter 27-19 is heightened because the state judiciary is required by that statute to police a discriminatory judicial process (App. A, *infra* 16a-17a). *Shelley v. Kraemer*, 334 U.S. 1 (1948). The state court concluded that Chapter 27-19 both requires and permits the automatic dismissal of any state court action by a tribal Indian in these circumstances (App. A, *infra* 16a-17a).

For these reasons, petitioner submits that Chapter 27-19 violates the due process and equal protection rights

of tribal Indians guaranteed to them by the Fourteenth Amendment.

II.

North Dakota Cannot Require An Indian Tribe To Waive Its Immunity To State Civil Jurisdiction In All Cases As A Condition For Bringing A Damages Action Against A Non-Indian Defendant In State Court.

North Dakota is precluded from imposing Chapter 27-19 on Indian tribes by governing federal law. Indian tribes under that statute must waive their immunity, as a condition for bringing a damages action against a non-Indian defendant, to general state jurisdiction in all cases. State courts, pursuant to the terms of Chapter 27-19, by virtue of this tribal waiver would have jurisdiction over all causes of action and obligations that may arise against the Tribe, whether on or off reservation, during the period of such consent. *See* § 27-19-13, N.D.C.C. (App. B, *infra* 31a). Other provisions of Chapter 27-19 authorize the state court, by virtue of such consent, to exercise jurisdiction over a broad category of subject matter presently within the exclusive jurisdiction of the Indian tribes. *See* § 27-19-08, N.D.C.C. (App. B, *infra* 29a-30a).

Indian tribes, recognized by federal law as limited sovereigns, possess such powers of self-government as are consistent with that status and as have not been denied to them by Congress. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209-210 (1978); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831).

This retained but limited right of self-government accorded to Indian tribes by federal law includes their

sovereign immunity from suit except by way of congressional consent. *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 512-513 (1940). Federal law has also recognized the legal capacity of tribes to bring actions in their own right to protect their property and interests from wrongful intrusion by non-Indians. *See Three Affiliated Tribes v. Wold Engineering*, 104 S. Ct. 2274; *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370-371 (1968); *Creek Nation v. United States*, 302 U.S. 618 (1938).

This state imposed waiver Requirement, subjecting the Tribe to general civil liability in all cases, clearly conflicts with the decisions of this Court holding that the Indian tribes should be free of such liability. *United States Fidelity and Guaranty Co.*, 309 U.S. at 513 (this Court held the doctrine of sovereign immunity "is particularly applicable to Indian nations with their unusual governmental organizations and peculiar problems.")

The subjection of Indian tribes to civil liability in foreign courts, because of the potential for disruption of tribal autonomy and their right to self-government, must result from clear congressional action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-57 (1978); *Ramey Construction Company v. Apache Tribe*, 673 F.2d 315, 319 (10th Cir. 1982); *United Nuclear Corp. v. Clark*, 584 F. Supp. 107, 108 (D.D.C. 1984).

Further, general state judicial jurisdiction, over consenting tribal members in the enumerated categories of subject matter as contemplated by Chapter 27-19, would likewise clearly impair or interfere with a right reserved, or granted, to the Tribe by federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 142, 143 (1980); *Williams v. Lee*, 358 U.S. 217, 220 (1959).

As a procedural matter, tribal consent to North Dakota's assumption of jurisdiction under Chapter 27-19 would be effective only if manifested in accordance with the tribal election procedures set forth in Public Law 90-284. *See* 25 U.S.C. § 1326 (1983). *See also Kennerly v. District Court*, 400 U.S. 423 (1971). The North Dakota Supreme Court held, before this Court's decision in this matter, that Section 27-19-05 had been preempted by the congressional enactment in 1968 of Public Law 90-284, the amended form of Public Law 280. *Nelson v. Dubois*, 232 N.W.2d 64 (N.D. 1975).

However, the North Dakota court, based, petitioner submits, on an erroneous reading of this Court's opinion, revived that section as the means for acquiring general jurisdiction over Indian tribes, or their members, within the Indian reservations in North Dakota (App. A, *infra* 7a-8a).

The subjection of a tribe to general civil liability in a state court is clearly a jurisdictional step of such moment that a tribe and state must comply with the tribal election requirement set forth at 25 U.S.C. § 1326 (1983).

For these reasons, petitioner submits that Chapter 27-19 conflicts with governing federal Indian law and is therefore preempted under the Supremacy Clause of the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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App. 1

APPENDIX A

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Three Affiliated Tribes of the Fort Berthold Reservation,
Plaintiff and Appellant

v.

Wold Engineering, P.C., a North Dakota Professional Corporation,
Defendant, Third-Party Plaintiff and Appellee

v.

Schmit, Smith & Rush,

Third-Part Defendant

Civil No. 10,172

(Filed March 13, 1985)

Appeal from the District Court of Ward County, Northwest Judicial District, the Honorable Wallace Berning, Judge. Judgment affirming rendered by this Court July 1, 1982, vacated by the United States Supreme Court and remanded to this Court for further proceedings May 29, 1984.

OPINION RENDERED JULY 1, 1982, VACATED, JUDGMENT OF DISTRICT COURT MODIFIED, AND CASE REMANDED FOR FURTHER PROCEEDINGS.

Opinion of the Court by Erickstad, Chief Justice.

John O. Holm, 17 Second Avenue West, Dickinson, ND 58601, and Raymond Cross, P. O. Box 220, New Town,

ND 58763, for plaintiff and appellant; argued by John O. Holm.

Bosard, McCutcheon and Rau, P. O. Box 939, Minot, ND 58702, for defendant, third-party plaintiff and appellee; argued by Gary H. Lee.

Pringle and Herigstad, P. O. Box 1000, Minot, ND 58702, for third-party defendant; did not participate.

Three Affiliated Tribes v. Wold Engineering

Civil No. 10,172

ERICKSTAD, Chief Justice.

On July 1, 1982, this Court, in a unanimous opinion, affirmed the judgment of the District Court of Ward County. Three Affiliated Tribes of the Fort Berthold Indian Reservation (Affiliated) had appealed from a judgment of that court dismissing the complaint for lack of subject matter jurisdiction. The basic issue on appeal was whether or not the state court had subject matter jurisdiction over a civil action arising within the exterior boundaries of the Fort Berthold Indian Reservation in which Affiliated was the plaintiff and the defendants were non-Indians. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 321 N.W.2d 510 (N.D. 1982).

Following an application for a writ of certiorari from the United States Supreme Court, that Court granted the writ, received briefs from the parties, heard arguments of counsel, and on a seven-to-two basis on May 29, 1984, vacated the judgment of our Court and remanded the case for further proceedings not inconsistent with its opinion.

In its opinion, the majority, speaking through Mr. Justice Blackmun, said:

"In sum, then, no federal law or policy required the North Dakota courts to forgo the jurisdiction recognized in *Vermillion* [*v. Spotted Elk*, 85 N.W.2d 432 N.D. 1957)] in this case. If the North Dakota Supreme Court's jurisdictional ruling is to stand, it must be shown to rest on state rather than federal law.

. . . .

"If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

"Here, a careful reading of the North Dakota Supreme Court's opinion leaves us far from certain that the court's present interpretation of Chapter 27-19 does not rest on a misconception of federal law. In determining the role played by that court's understanding of federal law, we are guided by the jurisdictional principles that have come to govern our calculation of adequate and independent state grounds. In *Michigan v. Long*, 463 U.S. —, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this Court ruled that 'when . . . a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.' *Id.*, at —, 103 S.Ct., at 3476. Although petitioner's constitutional challenge to the North Dakota Supreme Court's judgment means that we do not face a question of our own jurisdiction, see *Standard Oil Co. v. Johnson*, 316 U.S., at 482-483, 62 S.Ct., at 1169, we

believe that the same general interpretive principles properly apply here. The North Dakota Supreme Court's opinion does state that the North Dakota Legislature 'totally disclaimed jurisdiction over civil causes of action arising on an Indian reservation,' but it adds that the legislature did so 'pursuant to Public Law 280,' '[u]nder the authority of Public Law 280,' and 'under explicit authority granted by Congress in the exercise of its federal power over Indians.' 321 N.W.2d, at 511-513." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, — U.S. —, —, 104 S.Ct. 2267, 2276-77, 81 L.Ed.2d 113, 124-25 (1984).

In essence, what the United States Supreme Court is telling us is that the courts of our state have jurisdiction to try this dispute, because jurisdiction was acquired through the exercise of jurisdiction prior to the amendments of Public Law 280 by Congress in 1968, notwithstanding the contract between the United States and North Dakota created by Section 4, subdivision 2, of the Congressional Enabling Act, passed February 22, 1889,¹ and the second part of Section 203 of Article XVI of the North Dakota Constitution as it read before amendment in 1958.²

In other words, the Court is saying that by exercising jurisdiction in *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957), a case involving a tort action brought by an Indian against another Indian, arising out of an automobile accident which occurred on a highway within the exterior boundaries of an Indian reservation in this state, our state courts acquired jurisdiction which was not affected by the amendments to Public Law 280 in 1968 by the enactment of the Indian Civil Rights Act (Pub.L. 90-284, §§ 401, 402, 406, 82 Stat. 78-80, codified at 25 U.S.C.

§§ 1321, 1322, 1326),³ notwithstanding that Section 1322 required the consent of the tribe occupying the particular Indian country, notwithstanding that in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), the United States Supreme Court said that the Supreme Court of Arizona had no jurisdiction over an action on a debt arising on the Navajo Reservation, brought by a non-Indian against an Indian couple, and notwithstanding that the reasoning applied in *Vermillion*, that the Congressional Enabling Act and the disclaimer in Section 203 of Article XVI of the North Dakota Constitution did not constitute a reservation by the United States of exclusive jurisdiction over civil causes of action between Indians residing on the reservation, if the actions did not involve Indian lands, has been criticized as faulty.

In light of the mandate of the Supreme Court in this case, our first task on remand appears to be to determine the meaning of Chapter 27-19, N.D.C.C., the Indian Civil Jurisdiction Act enacted on March 2, 1963, by our state legislature.

We are reminded that in so doing we have in the past construed state statutes:

"[T]o avoid potential state and federal constitutional problems, see, e.g., *State v. Kottenbroch*, 319 N.W.2d 465, 473 (1982); *Paluck v. Board of County Comm'rs*, 307 N.W.2d 852, 856 (1981); *Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W.2d 767, 772 (1980); *North American Coal Corp. v. Huber*, 268 N.W.2d 593, 596 (1978); *Tang v. Ping*, 209 N.W.2d 624, 628 (1973)." — U.S. at —, 104 S.Ct. at 2278, 81 L.Ed.2d at 126.

Although we normally would not attempt to construe a statute unless it were ambiguous, and an ambiguity in

Chapter 27-19 is not obvious on its face, because the United States Supreme Court is of the view that we may have been influenced in our decision as to both its meaning and its constitutionality because of our erroneous view of Public Law 280 and its amendments, we shall in this case attempt to determine the meaning of Chapter 27-19 through a study of the legislative history of that chapter.

It is interesting to note that Chapter 27-19 resulted from an interim study of the North Dakota Legislative Research Committee conducted in the interim between the 1961 and 1963 legislative sessions.

The report to the Thirty-eighth Legislative Assembly (the 1963 session of the Legislature) discloses that a subcommittee on Indian affairs was appointed pursuant to passage of Senate Concurrent Resolution "R-R" and House Concurrent Resolution "T-1" of the Thirty-seventh Legislative Assembly. A review of the report to the Thirty-eighth Legislative Assembly discloses the care in which the subcommittee acted.⁴

It is particularly interesting to note that in Part III of the report of the full legislative research committee to the Legislature, the assertion is made under part 1(i) that the assumption of civil jurisdiction by the state would provide, among other things, a tool for the accomplishment of eleven different objectives, including enforcement of contracts between Indians and non-Indians and providing a tribunal for trying tort actions.⁵

The bill prepared by the full legislative committee to accomplish the objectives as they related to civil jurisdiction was Senate Bill 30. This bill as originally introduced consisted of only six sections. The main section

was Section 1 whereby the state was to *unilaterally* accept exclusive jurisdiction over all civil causes of action which arise on Indian reservations.⁶

When the bill was first considered by the State and Federal Government Committee to which it had been referred, Representative Harold Hofstrand, the chairman of the subcommittee on Indian affairs of the Legislative Research Committee which had conducted the interim study, appeared before the Senate State and Federal Government Committee to request that a hearing be set to which should be invited the Indian tribal chairmen and the members of the Indian Affairs Commission.

When the public hearing was held, a number of Indian leaders, both within and without the State of North Dakota, appeared to oppose the passage of the bill, some asserting that civil jurisdiction should not be assumed by the state without a vote of the Indian people⁷ and, apparently, as a result thereof, the bill was amended to provide for acceptance of civil jurisdiction by the state upon acceptance by the Indian citizens as provided in Sections 2 and 5 of the bill as it finally passed the Legislature.⁸

In light of this background and the seeming intent of the Legislature to accommodate the will of the Indian people in Section 2 (§ 27-19-02 N.D.C.C.), and the will of the individual Indian in Section 5 (§ 27-19-05, N.D.C.C.), to accept state jurisdiction, even to the extent of providing for a means of the Indian people in Sections 11 and 12 and the individual Indian in Section 13 (§§ 27-19-11, -12, -13, N.D.C.C.), for withdrawing from state civil jurisdiction, and further in keeping with our policy of construing a statute to uphold its constitutionality against either state

or federal constitutional attack, we conclude that the Affiliated Tribes in this case may properly bring their action in state court providing they comply with Section 27-19-05. This will subject the property of the Tribes, as distinguished from the property of the individual Indians, to levy and execution pursuant to judgment of the state court except as such property may be exempt therefrom by appropriate state or federal law.

Further, because of what the United States Supreme Court has taught us in this case, we conclude that our language in *Nelson v. Dubois*, 232 N.W.2d 54, 57 (N.D. 1975) was too broad, and, accordingly, we disavow the following language of that case:

"We now conclude that state jurisdiction over Indian country may be obtained only by state and tribal compliance with Public Law 90-284, §§ 402 and 406. An individual defendant is no more able to confer jurisdiction upon the state than is a tribal council or a State, acting unilaterally. Section 27-19-05, N.D.C.C., enacted pursuant to Public Law 83-280, § 7 (1953), 67 Stat. 588, must now yield to the new federal doctrine." 232 N.W. 2d at 57.

As neither the act itself nor the legislative history provides for or recognizes any type of "residuary" state jurisdiction, we conclude that the act terminated any such jurisdiction if it did previously exist.

Having so construed Chapter 27-19, N.D.C.C., we must now consider whether or not, as so construed, it violates either the State or the United States Constitution. We are convinced that it does not.

Affiliated argued, prior to the construction which we have now given Chapter 27-19, that it violated Article I,

Section 9, of our State Constitution which requires that all courts be open to everyone;⁹ Article I, Section 22, of our State Constitution which requires all laws of a general nature to have a uniform operation;¹⁰ and Article IV, Section 103, which is now, after renumbering Article VI, Section 8, which provides that the district court shall have original jurisdiction of all causes.¹¹ In our view, none of these provisions are being violated.

As for Article I, Section 9, the courts are open to Affiliated providing it complies with Section 27-19-05. True, Affiliated will become subject to the court upon compliance with that section, but no more so than the defendants Wold Engineering and Schmit, Smith and Rush.

As for Article I, Section 22, that all laws of a general nature shall have a uniform operation, we have difficulty seeing how that has application to this case. This is apparently an equal protection argument which will be incidentally involved when we consider the application of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

As for Article VI, Section 8, which provides that the district court shall have original jurisdiction of all causes except as otherwise provided by law, we conclude that the contention that it has been violated by Chapter 27-19 as now construed is without merit. The district court will have original jurisdiction if Affiliated complies with Section 27-19-05.

The last issue that we must discuss is the issue of whether or not Chapter 27-19, as now construed by our Court, violates certain provisions of the United States

Constitution. Affiliated contends that Chapter 27-19 violates the due process clause and the equal protection clause of the Fourteenth Amendment.¹² All of the cases cited to us are distinguishable on the facts and none of the cases cited come even close to being comparable.

Affiliated quotes the following language from *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), for the proposition that the United States Supreme Court has declared that procedural due process is an important constitutional right that cannot be destroyed by state legislative enactment:

“But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.”

In *Hill*, the plaintiff brought suit to enjoin the collection of property taxes, alleging that the assessment violated the equal protection clause of the Fourteenth Amendment. In previous cases, the Supreme Court of Missouri had ruled that no administrative remedy was available and that injunctive relief was appropriate for the determination of the validity of such a claim. The Missouri court overruled the earlier cases, and it denied relief because the plaintiff had failed to seek a newly found administrative remedy. The United States Supreme Court determined that the practical effect of the judgment of the Missouri court was to deprive the plaintiff of prop-

erty without affording it at any time an opportunity to be heard in its defense. “[B]y denying to it [the plaintiff] the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.” 281 U.S. at 679. The Court reversed the judgment because it had denied the plaintiff due process of law.

Affiliated argues that Chapter 27-19 operates to deprive tribal Indians, not only of procedural due process, but of access to state courts entirely.

Affiliated cites *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), for the proposition that tribal Indians’ property rights, protected under the due process clause, are no more destructible than are their civil liberties, which include the right “to sue.” In *Lynch*, the United States Supreme Court reversed the lower court’s dismissal of the appellant’s complaint which alleged that a Connecticut law authorizing summary pre-judicial garnishment was invalid under the equal protection and due process clauses of the Fourteenth Amendment, and which sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3). The lower court had dismissed the complaint, in part, on the ground that it lacked jurisdiction under § 1343(3), because that section applied only if “personal” rights, as opposed to “property” rights, were allegedly impaired. The Court rejected that distinction in concluding that §§ 1983 and 1343(3) provide a federal judicial forum for the redress of wrongful deprivations of *property* by persons acting under color of state law.

Affiliated argues, based upon the broad legal propositions it has gleaned from *Hill*, and *Lynch*, "that strict constitutional scrutiny of Chapter 27-19 is justified because it clearly burdens Indians' rights that are protected by the Fourteenth Amendment," citing *Logan v. Zimmerman*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). We assume that what Affiliated refers us to by its citation to *Logan*, is the two-part due process inquiry articulated therein: "[W]e must determine whether Logan was deprived of a protected interest, and, if so, what process was his due," *id.*, and the Court's reference in that case to the holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), that a cause of action is a species of property protected by the due process clause.

In our view, Affiliated has not been *deprived* of a protected interest or denied access to state courts because of legislative or judicial action by the state, but rather, to the contrary, jurisdiction has been offered by the state over all civil causes of action which arise on an Indian reservation upon acceptance by Indian people as provided by law. The *Indian people* have deprived themselves of access to state courts because they have not accepted state jurisdiction in the manner provided for in Chapter 27-19, N.D.C.C. The *tribes* will deprive themselves of access to the state courts in the future if they do not avail themselves of the opportunity provided for acceptance of state jurisdiction through our construction of Section 27-19-05, N.D.C.C., today.

Affiliated also asserts that Chapter 27-19 represents constitutionally suspect class-based legislation that singles

out a discrete, insular minority for disadvantaged legislative treatment.

The case most closely related to this case, referred to by Mr. Justice Rehnquist in his dissent in this case, *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), authored by Mr. Justice Stewart, appears to hold to the contrary. In *Washington v. Confederated Bands and Tribes*, the Court rejected a similar challenge to a Washington statute, Ch. 36, 1963 Wash. Laws, which obligated the state to assume civil and criminal jurisdiction over Indians and Indian territory within the state, subject only to the condition that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands without the request of the Indian tribe affected. In holding that this "checkerboard" pattern of jurisdiction applicable on the reservations of non-consenting tribes was not on its face invalid under the equal protection clause of the Fourteenth Amendment, the United States Supreme Court said:

"First, it [the Tribe] argues that the classifications implicit in Chapter 36 are racial classifications, 'suspect' under the test enunciated in *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, and that they cannot stand unless justified by a compelling state interest. Second, it argues that its interest in self-government is a fundamental right, and that Chapter 36—as a law abridging this right—is presumptively invalid. Finally, the Tribe argues that Chapter 36 is invalid even if reviewed under the more traditional equal protection criteria articulated in such cases as *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520.

"We agree with the Court of Appeals to the extent that its opinion rejects the first two of these

arguments and reflects a judgment that Chapter 36 must be sustained against an Equal Protection Clause attack if the classifications it employs 'rationally further the purpose identified by the State.' *Massachusetts Bd. of Retirement v. Murgia*, *supra*, at 314, 96 S.Ct., at 2567. It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535, 551-552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub. L. 280. And many of the classifications made by Chapter 36 are also made by Pub. L. 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, *see, e.g., United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power." [Footnotes omitted.]

Chapter 27-19 does not constitute a restriction against Indian people or individual Indians accepting the jurisdiction of the state judicial system, rather it is a limita-

tion of the state judicial system preventing it from imposing jurisdiction upon the Indian people or individual Indians against their will and without their consent. The statute does not treat them less than equal, it treats them more than equal. In light of the fact that they have demanded this unique treatment, they cannot reasonably complain of it, especially when they have within themselves the power to be free from this protective web if they so desire. Not only do they have the authority to accept jurisdiction, but they have the authority after acceptance to terminate it.¹³ It would be difficult to contemplate a statute which was fair to all that could protect the Indian more and restrict the Indian less than Chapter 27-19.

Accordingly, we vacate the opinion initially rendered by our Court on July 1, 1982, substitute this opinion therefor, and remand this case to the district court with instructions to proceed consistent herewith.

In so holding, we suspect that neither side of this controversy will be completely satisfied. This causes us to assert that, aside from the very narrow issue of residuary jurisdiction involved in this case, the Indian people will not receive justice on a par with other citizens of this state until they realize that their rights are best preserved in the state courts and they *vote to accept* state jurisdiction in all civil cases; or until the Congress of the United States so realizes and as a consequence *requires* acceptance of state jurisdiction by the Indian tribes and the Indian people; or until the Congress of the United States *creates a federal court* with jurisdiction to decide civil cases arising within the exterior boundaries of Indian reservations. Indians are now full citizens of this state,

they have the franchise and they could receive the fruits of justice in our state courts if they would but accept jurisdiction for all civil purposes, submit their problems to those courts, and have faith in the judicial system which all other citizens, irrespective of their ancestry, must and do rely upon.

In view of the realization that over 20 years have elapsed since the Legislature conducted its study into Indian problems, the unfulfilled great hope of the Legislature in the improvement of Indian and non-Indian relations which would result from the ultimate assumption by the state or acceptance by the Indian people of civil jurisdiction, and the existence of a multitude of problems arising from the lack of uniform jurisdiction, we believe it to be appropriate and timely for the Legislature to again create an interim Indian jurisdiction study committee, which would include representatives of the Indian people, which study hopefully might be conducted contemporaneously with a national study by Congress with the object of finding a solution to these complex and emotional problems. It is quite obvious that a court such as ours cannot resolve the problems in a piece-meal, case-by-case basis. Ultimately, most issues in this area are brought to this Court with very disappointing results because we are required to say in most cases that our state courts do not have jurisdiction to decide the issues that cry out for an answer.

Notwithstanding what we have just said in the two preceding paragraphs, we emphasize that we are relying in this case wholly on independent and adequate state grounds. Those grounds are that Chapter 27-19, N.D.C.C.,

requires and permits the disposition we have made in this case and that our disposition does not offend the state constitution.

/s/ Ralph J. Erickstad

/s/ Gerald W. VandeWalle

/s/ H. F. Girke III

/s/ Vernon R. Pederson S.S.

Surrogate Judge Pederson participated in this case by assignment pursuant to § 27-17-033, N.D.C.C.

Justice Paul M. Sand, who died on December 8, 1984, was a member of this Court at the time this case was submitted.

¹ "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Enabling Act of Feb. 22, 1889, § 4, cl. 2, 25 Stat. 676.

² "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;" N.D. Const. art. XVI, § 203 (1889).

³ "Assumption by State of Civil Jurisdiction

"Sec. 402. (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State." Pub.L. 90-284, § 402(a), 82 Stat. 79, codified at 25 U.S.C. § 1322(a).

⁴ "Although such has been said about reservation problems at numerous conferences and meetings, and even on the floors of the Legislative Assembly, the Committee decided to begin its work by obtaining thorough, first-hand information about Indian law enforcement, education, health, and welfare problems directly from the Indian citizens themselves.

"A series of hearings was therefore held on all reservations in all Indian counties in the State. The hearings and meetings followed the pattern of meeting at the county seat with representatives of the counties and cities, law enforcement officials, juvenile commissioners, and interested citizens

—plus such Indian citizens from the areas as might choose to attend. The Committee would then shift its hearing to a location on the reservation that would be more convenient for the attendance of Indian citizens, and all residents of the reservation as well as representatives of the Bureau of Indian Affairs were invited to attend. Such meetings and hearings were held at the cities of Rolla and Dunseith in Rolette County and at Belcourt on the Turtle Mountain Indian Reservation; at Parshall and New Town in Mountrail County; at Halliday and at the Twin Butte School in Dunn County for the Fort Berthold Reservation; at Fort Yates in Sioux County for the Standing Rock Reservation; at Minnewaukan in Benson County and at Fort Totten for the Fort Totten Reservation.

"All of these hearings were well attended and in every instance residents of the reservations, local officials, and interested citizens spoke freely and frankly. At several of the hearings the interest was so high that it was necessary for the hearings to be continued for several hours past their scheduled time for adjournment.

"The Committee recognized from the beginning that the responsibility for government on the reservations and the provision of governmental services is in fact a partnership affair. While the historic and legal responsibility for most of the normal services of government rests with the United States, by treaty and by congressional act, the Federal Government has delegated substantial authority to tribal governments, and over the years the State of North Dakota and its political subdivisions have provided substantial governmental services, especially in the field of welfare. In view of the divided responsibility for reservation government and governmental services, it was obvious to the Committee that State action alone could not affect all areas in which serious problems exist. In addition, there is much confusion as to which level of government has the responsibility for certain functions or services, or even which level of government might have jurisdiction to offer services.

"Following a number of Committee meetings and the series of hearings described earlier in this report, the Committee decided that its report and recommendations should not be limited to only those areas in which the State might have authority to take action, but should view the matter as a whole, delineate the problems, and suggest the areas in which the Federal, tribal, or State governments should be active, and recommend specific action by each level of government." Report of the North Dakota Legislative Research Committee, Thirty-eighth Legislative Assembly, Indian Affairs 1963, at 31.

5 "1. The assumption of civil jurisdiction by the State would provide, among other things, a tool for:

1. Determining the parentage of children;
2. Enforcing support by the head of the household for the wife, children, or dependents;
3. Placement of children in foster homes, both on and off the reservations;
4. Termination of parental rights and provisions for adoption of Indian children;
5. Providing institutional custody and rehabilitation services for juvenile delinquents in some instances;
6. Handling divorces and other matters affecting mixed marriages;
7. Involuntary commitment of mentally ill Indians to mental institutions;
8. Enforcement of contracts between Indians and non-Indians;
9. Providing a tribunal for trying tort actions (wrongful injuries to persons or property);
10. Permitting the service of civil process upon reservations by State authorities;
11. Providing a tribunal for the settlement or trial determination of many types of actions too numerous to mention." Report of the North Dakota Legislative Research Committee, Thirty-eighth Legislative Assembly, at 36.

6 "SECTION 1.) In accordance with the provisions of Public Law 280 of the 83rd Congress and Section 203 of the North Dakota Constitution, the state of North Dakota hereby accepts and shall have exclusive jurisdiction over all civil causes of action which arise on Indian reservations or in Indian country to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such Indian reservations or Indian country as they have elsewhere within this state." Senate Bill 30, Thirty-eighth Legislative Assembly.

7 "Marvin Sonosky, 1700 K St., Washington, D.C., representing Standing Rock Indian reservation, spoke against passage of the bill. He said there were only four Indians on the Indian Commission and that wasn't enough. He believed it was only local merchants concerned about collecting debts. President Eisenhower signed a bill from another state but said it was unchristian. He believes the only reason the state didn't want criminal jurisdiction was because it would cost too much money but civil jurisdiction was easier to do. He asked that the legislature give the Indians time to vote whether they want this civil jurisdiction but added they don't want it. Standing Rock is partly in North Dakota and partly in South Dakota so this would put only part of the reservation in civil jurisdiction which would create problems. Mr. Sonosky gave an example of Petitions filed in 7th district circuit court in South Dakota of Julia Hankins which was appealed. He stated that Standing Rock is eligible for a million and a half dollar housing project this year. But if they are under civil jurisdiction, they are not eligible.

* * *

"Theodore Jamerson, past tribal chairman and a present employee on Standing Rock Reservation, introduced several men with him from the reservation. He took a definite stand against S.B. No. 30. He feels they have a good setup for their Indian people. We only hear about the bad ones and not the good ones. He stated that Standing Rock Indian reservation courts are far superior to County Courts and also the police department. They are interested in the textile plant at McLaughlin, South Dakota and the cheese plant at Selfridge. He went on to say that the reservation operates their program according to the individual's ability and not all on the same level. They are trying to raise economic standards of living so they can get away from Welfare. He left several reports with the Committee.

* * *

"Carl Whitman, tribal chairman, Ft. Totten reservation said the general feeling of the reservation is against civil jurisdiction and he is convinced our Indians aren't ready for civil jurisdiction. His Indians are still adjusting to displacing of their homes for the Garrison Dam. He feels state should wait until the Indian asks for civil jurisdiction." Minutes of the Senate State and Federal Government Committee Meeting, January 15, 1963.

⁸ "§ 2.) Acceptance of jurisdiction may be by either of the following methods:

1. Upon petition of a majority of the enrolled residents of a reservation who are twenty-one years of age or older; or
2. The affirmative vote of the majority of the enrolled residents voting who are twenty-one years of age or older, at an election called and supervised by the North Dakota Indian affairs commission upon petition of fifteen percent of those eligible to vote at such an election.

* * *

"§ 5.) An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein." N.D. Sess. Laws, Ch. 242, §§ 2, 5 (1963).

⁹ "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." N.D. Const. art. I, § 9.

¹⁰ "All laws of a general nature shall have a uniform operation." N.D. Const. art. I, § 22.

¹¹ "The district court shall have original jurisdiction of all causes, except as otherwise provided by law, and such appellate jurisdiction as may be provided by law or by rule of the supreme court. The district court shall have authority to issue such writs as are necessary to the proper exercise of its jurisdiction." N.D. Const. art. VI, § 8.

¹² "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

¹³ "Civil jurisdiction as herein provided over an Indian reservation may be terminated by petition of three-fourths of the enrolled residents of a reservation who are eighteen years of age or older. Such petition shall be filed with the North Dakota Indian affairs commission." § 27-19-11, N.D.C.C.

"Upon the filing of a petition for withdrawal from the civil jurisdiction of the state, the executive director of the North Dakota Indian affairs commission after substantiating that the provisions of section 27-19-11 have been complied with shall certify such withdrawal to the governor. Upon such certification the governor shall, within ten days, issue a proclamation proclaiming that thirty days from the date of the issuance of such proclamation the civil jurisdiction of the state shall be terminated except as to those causes of action which arose prior to the effective date of such termination or to those contractual obligations which were incurred prior to the effective date of such termination of state civil jurisdiction." § 27-19-12, N.D.C.C.

"An individual who has accepted state civil jurisdiction under the provisions of section 27-19-05 may withdraw upon filing with the county auditor a statement declaring his withdrawal. Such withdrawal shall not affect causes of action which arose prior to such withdrawal or contractual obligations which were incurred prior to such withdrawal." § 27-19-13, N.D.C.C.

APPENDIX B**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED***Federal;***U.S. CONST. AMEND. XIV****Section 1**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 402(a) OF PUBLIC LAW 90-284**82 STAT. 79, CODIFIED AT 25 U.S.C. § 1322 (1983)****§ 1322. Assumption by State of civil jurisdiction**

(a) Consent of United States; force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes

of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

**SECTION 404 OF PUBLIC LAW 90-284,
82 STAT. 79, CODIFIED AT 25 U.S.C. § 1324****§ 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date**

Notwithstanding the provisions of any enabling act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title (25 USCS §§ 1321 et seq.). The provisions of this title (25 USCS §§ 1321 et seq.) shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

**SECTION 406 OF PUBLIC LAW 90-284,
82 STAT. 79, CODIFIED AT 25 U.S.C. § 1326 (1983)****§ 1326. Special election**

State jurisdiction acquired pursuant to this title (25 USCS §§ 1321 et seq.) with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled In-

dians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 percentum of such enrolled adults.

SECTION 16, 16 STAT. 144,
CODIFIED AT 42 U.S.C. § 1981 (1981)

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SECTION 1 OF PUBLIC LAW 96-170,
93 STAT. 1284, CODIFIED AT 42 U.S.C. § 1983 (1981)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

State:

N.D. CONST. ART I.

Section 9. All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

INDIAN CIVIL JURISDICTION ACT

CHAPTER 27-19 OF
N.D. CENTURY CODE (1974)

27-19-01. Assumption of jurisdiction.—In accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general ap-

plication to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.

27-19-02. Method of acceptance.—Acceptance of Jurisdiction may be by either of the following methods:

- (1) Upon petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older; or
- (2) The affirmative vote of the majority of the enrolled residents voting who are eighteen years of age or older, at an election called and supervised by the North Dakota Indian Affairs Commission.

27-19-03. Acceptance proclamation.—Upon acceptance of civil jurisdiction by either method provided in section 27-19-02 the executive director of the Indian affairs commission shall certify such acceptance to the governor. Upon such certification the governor shall, within ten days, issue a proclamation proclaiming that thirty days from the date of the issuance of such proclamation the provisions of this chapter shall be in effect.

27-19-04. Effective date.—The provisions of this chapter shall affect only those causes of action which arise after the effective date of state jurisdiction as provided in section 27-19-03.

27-19-05. Individual acceptance.—An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction

shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein.

27-19-06. Acceptance by guardian.—A guardian appointed by the tribal court or court of Indian offenses may consent to state civil jurisdiction for his ward provided he is authorized to do so by the tribal court or court of Indian offenses.

27-19-07. Contempt powers.—In addition to other authority conferred by this chapter, the courts of this state shall have the power to hold persons in civil or criminal contempt of court in order to maintain the dignity of the courts and enforce their orders.

27-19-08. Limitations upon jurisdiction.—Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. The civil jurisdiction herein accepted and assumed shall include but shall not be limited to the determination of parentage of children, termination of par-

ental rights, commitments by county mental health boards or county judges, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents.

27-19-09. Tribal ordinances and customs preserved.—Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community, in the exercise of any authority which it may possess shall, if not inconsistent with the applicable civil law of this state, be given full force and effect in the determination of civil causes of action pursuant to this section.

27-19-10. Other benefits not affected.—The provisions of this chapter shall not be construed as requiring the extension of any health, welfare, educational or other governmental service to Indian reservations or Indian country, not otherwise required by the laws or constitution of this state.

27-19-11. Petition for withdrawal.—Civil jurisdiction as herein provided over an Indian reservation may be terminated by petition of three-fourths of the enrolled residents of a reservation who are eighteen years of age or older. Such petition shall be filed with the North Dakota Indian affairs commission.

27-19-12. Withdrawal proclamation.—Upon the filing of a petition for withdrawal from the civil jurisdiction of the state, the executive director of the North Dakota Indian affairs commission after substantiating that the provisions of section 27-19-11 have been complied with shall certify such withdrawal to the governor. Upon such certification the governor shall, within ten days, issue a pro-

clamation proclaiming that thirty days from the date of the issuance of such proclamation the civil jurisdiction of the state shall be terminated except as to those causes of action which arose prior to the effective date of such termination or to those contractual obligations which were incurred prior to the effective date of such termination of state civil jurisdiction.

27-19-13. Individual withdrawal.—An individual who has accepted state civil jurisdiction under the provisions of section 27-19-05 may withdraw upon filing with the county auditor a statement declaring his withdrawal. Such withdrawal shall not affect causes of action which arose prior to such withdrawal or contractual obligations which were incurred prior to such withdrawal.

APPENDIX C

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Three Affiliated Tribes of the Fort Berthold
Reservation,

Plaintiff and Appellant,

v.

Wold Engineering, P.C., a North Dakota Pro-
fessional Corporation,

Defendant, Third-Party
Plaintiff, and Appellee,

v.

Schmit, Smith & Rush,

Third-Party Defendant.

Civil No. 10,172

ON REMAND FROM
THE UNITED STATES SUPREME COURT
PETITION OF APPELLANT, THREE AFFILIATED
TRIBES, FOR REHEARING

Appellant, Three Affiliated Tribes, respectfully prays
this Court to grant its Petition for Rehearing in this mat-
ter pursuant to Rule 40 of the North Dakota Rules of
Appellate Procedure for the reasons set forth below.

I.

Introduction

The very kernel of this case is whether anything in
state law bars the adjudication in state court of the Three

Affiliated Tribes' damages action against a non-Indian
engineering firm. *Three Affiliated Tribes v. Wold Engi-
neering*, 104 S.Ct. 2267, 2276-2277 (1984). This Court, in
responding to the United States Supreme Court's mandate
in this matter, decided in its Opinion of March 13, 1985,
that the state legislature's enactment of Chapter 27-19-05
of the N.D.C.C. in 1963 terminated any preexisting state
judicial jurisdiction over claims by tribal Indians against
non-Indians if those claims arose on an Indian reserva-
tion within North Dakota. However, this Court also held
that, by virtue of tribal consent to state civil jurisdiction
pursuant to the terms of Section 27-19-05 of the N.D.C.C.,
state courts may acquire the subject-matter jurisdiction
necessary to adjudicate tribal claims against non-Indians
in state courts.

This Court, in reaching that result, disavowed its
prior holding in *Nelson v. Dubois*, 232 N.W.2d 54, 57 (N.D.
1975, that Section 27-19-05 had been preempted by the
substantial Congressional amendment and reenactment,
through Pub.L. 90-284, of Pub.L. 280 in 1968. Neither party
in this matter had the opportunity to brief and argue the
unanticipated and unforeseen issue of whether tribal con-
sent to state civil jurisdiction was possible, given the pre-
vailing state of North Dakota law, under the terms of
Section 27-19-05. Reargument by the parties of this mat-
ter, as to the two limited issues set forth below, would
clarify this Court's holding as to the ramifications of such
tribal consent and would provide a guide to both the pres-
ent parties and to future litigants as to their conduct:

1) Whether such tribal consent under Section 27-19-
05 would be effective to confer judicial jurisdiction over

these categories of actions in light of *Kennerly v. District Court*, 400 U.S. 423 (1971). (Justice Blackmun, speaking for the majority of the Supreme Court in its decision on this matter, affirmed the Court's position that any *new assumption* of state jurisdiction, post 1968, must comply exclusively with the federal law set forth at 25 U.S.C. §§ 1301, 1322, 1324, 1326. See, *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct., ftn. 11 at 2276.)

2) Whether the scope of such tribal consent under Section 27-19-05, if such consent is effective to confer judicial jurisdiction over these categories of actions on the state courts, empowers the state courts to levy or execute on tribal property pursuant to their judgments consistent with Section 27-19-08 of the N.D.C.C., and governing federal law, constraining the exercise of such judicial jurisdiction.

II.

Argument

Tribal Consent Pursuant to Section 27-19-05 Will Not Confer on North Dakota Courts Authority to Adjudicate the Tribe's Claims against Wold Engineering.

This Court has decided that the enactment of Chapter 27-19 by the state legislature in 1963 effectively terminated any state judicial jurisdiction that may have existed over tribal claims against non-Indians before the date of that enactment. (*Opinion*, at p. 8) Therefore, as a matter of federal law, the acquisition of state civil jurisdiction now over such tribal claims can only be obtained by state and tribal compliance exclusively with federal law, not state law, as declared by the amended

and reenacted form of Pub.L. 280, set forth in Pub.L. 90-284. See, *Kennerly v. District Court*, *supra*. Justice Blackmun, speaking for the majority of the Supreme Court in its decision in this matter, confirmed that the exclusive method for the acquisition of new state civil jurisdiction—as future tribal compliance with Chapter 27-19-05 would purport to confer on North Dakota courts—is by compliance with the procedural and substantive requirements of Pub.L. 90-284, the amended and reenacted form of Pub.L. 280. *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct., ftn. 11 at 2276. See also, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 494 (1979) (The Congressional repeal in 1968 of Section 7 of Pub.L. 280 means that states such as North Dakota, can no longer acquire civil jurisdiction in Indian country except by compliance with the terms of governing federal law as represented by Pub.L. 90-284.)

Therefore, based on the foregoing, the Three Affiliated Tribes submit that tribal compliance with Section 27-19-05 would be ineffective, as a matter of controlling federal law in Indian affairs, to confer the civil jurisdiction necessary to hear this category of actions on state courts.

III.

Argument

Section 27-19-08 is an Affirmative State Legislative Constraint Barring The State Court Levy, or Execution, on Tribal Property

State courts cannot levy or execute on tribal property to satisfy a court judgment consistent with Section 27-19-08 of the N.D.C.C. The federal law governing In-

dian affairs likewise prohibits state courts from levying or executing on tribal trust property even if that state is acting pursuant to judicial authority granted to it under Pub.L. 280. The United States Supreme Court, Justice Brennan writing for the majority, said in the leading case on the matter, that:

. . . the express prohibition of any 'alienation, encumbrance, or taxation' of any trust property can be read as prohibiting state courts, *acquiring jurisdiction over civil controversies involving reservation Indians pursuant to § 4 from applying state laws or enforcing judgments in ways that would effectively result in the 'alienation, encumbrance, or taxation' of trust property.* (emphasis added) *Bryan v. Itasca County*, 425 U.S. 373, 391 (1976).

Re argument of this matter would allow this Court to reconsider its specific holding that tribal compliance with Section 27-19-05 would subject the property of the Three Affiliated Tribes to possible levy and execution on its property pursuant to judgment of the state court. (*Opinion*, at p. 7)

IV.

Conclusion

The Three Affiliated Tribes submit that the rehearing and reargument of this matter, consistent with this Petition, would serve to clarify the important judicial rights of both tribal and non-tribal litigants in future cases arising on Indian reservations within the state of North Dakota.

This Court should consider the counsel of Justice Frankfurter regarding the propriety of granting the Petition for Rehearing:

Because I deem a reargument to be required, I do not mean to imply that it would lead to a different result. *The basis of an adjudication may be as important as the decision. The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process.* (emphasis added) *Detroit v. Murray Corp.*, 357 U.S. 913, 915. (Justice Frankfurter writing in dissent to the denial of the petition for rehearing in the matter.)

This Petition for Rehearing should be granted and the case set for reargument on the regular calendar.

Respectfully submitted,

John O. Holm
Attorney for Appellant
17 Second Avenue West
Dickinson, North Dakota 58601

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellant, Three Affiliated Tribes, hereby certifies that he caused to be mailed to the following attorneys for parties to Civil No. 10,172, in the Supreme Court of the State of North Dakota on Remand from the United States Supreme Court, a true copy of Petitioner's Petition for Rehearing, via first class United States mail, on this____day of_____, 1985

John O. Holm
Attorney for Appellant
17 Second Avenue West
Dickinson, ND 58601

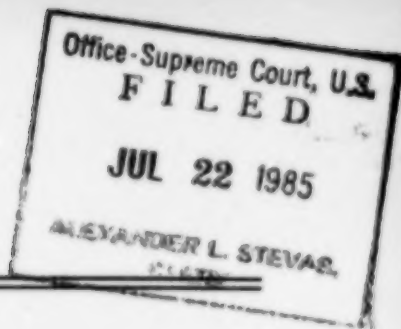
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OPPOSITION BRIEF

2
No. 84-1973



In the Supreme Court of the United States

October Term, 1984

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., A NORTH DAKOTA
PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI FROM THE SUPREME COURT
OF NORTH DAKOTA**

GARY H. LEE

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Wold Engineering

33/12/85

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether North Dakota law, which was enacted in an effort to compromise conflicting interests, and which requires tribal Indians to accept state court subject matter jurisdiction as a condition precedent to the exercise by the Courts of that State of jurisdiction over civil causes of action arising on the reservation and involving Indian litigants, is repugnant to the due process and equal protection clauses of the United States Constitution.

2. Whether North Dakota may require, consistent with governing federal law, an Indian tribe to waive its sovereign immunity as a condition precedent to the bringing by the tribe of a tort action in State court.

II. PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Three Affiliated Tribes of the Fort Berthold Indian Reservation, Petitioner.
2. Wold Engineering, P.C., a North Dakota professional corporation, and Schmidt, Smith & Rush, Respondents.

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IV. OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

The Opinion and Judgment of Dismissal without Prejudice from the North Dakota District Court, Northwest Judicial District, Ward County, Civil No. 46392, the Honorable Wallace D. Berning presiding, is an unreported decision.

The decision of the North Dakota Supreme Court, written by Ralph J. Erickstad, Chief Justice, affirming the trial court's judgment was reported in: *Three Affiliated Tribes v. Wold Engineering, et al.*, 321 N.W.2d 510 (N.D. 1982).

This case first appeared before this Court pursuant to grant of Writ of Certiorari issued April 25, 1983. *Three Affiliated Tribes, Petitioner v. Wold Engineering, Respondent*, U.S., 76 L.Ed.2d 805 (1983). On review, this Court vacated the decision of the North Dakota Supreme Court, and remanded the case for further proceedings. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, U.S., 81 L.Ed.2d 113 (1984).

After remand, the North Dakota Supreme Court vacated its earlier judgment, and ordered modification of the District Court opinion and judgment. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985). It is from this opinion and judgment Three Affiliated Tribes again seeks Writ of Certiorari.

V. JURISDICTIONAL STATEMENT

Petitioner argues that jurisdiction of this Court to review this case by Writ of Certiorari is conferred by 28 U.S.C. §1257(3). Petitioner asserts that the opinion of the

North Dakota Supreme Court which interprets Chapter 27-19, NDCC, Indian Civil Jurisdiction, as conditioning the exercise of State court subject matter jurisdiction upon the acceptance by tribal Indians of the benefits of that jurisdiction is repugnant to the United States Constitution.

Further, Petitioner asserts that the opinion of the North Dakota Supreme Court, which interprets Chapter 27-19, NDCC, as requiring an Indian tribe to accept the benefits of State subject matter jurisdiction and waive its sovereign immunity prior to the exercise of that jurisdiction by State courts is violative of governing federal law.

A Petition for Writ of Certiorari is timely if filed within 90 days after the issuance of the decision being appealed. 28 U.S.C. §2101(c). The decision of the North Dakota Supreme Court was issued on March 13, 1985, and later modified. The decision is final in all respects except that the North Dakota Supreme Court has not issued its mandate. Issuance of that final mandate was stayed pending this Petition for Writ of Certiorari, and pursuant to Rule 41(b), N.D.R.App.Pro.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitutional Provisions:

Article I, Section 8, Clause 3.

"The Congress shall have power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Amendment 14, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. Federal Statutes:

Enabling Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2.

"Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said states shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save

and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribed."

Public Law 280, Chapter 505, United States Statutes at Large 67, Section 6.

"SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

25 U.S.C. §1322. Reprinted in full in Appendix to Petition for Writ of Certiorari. App. pp. 24-25.

25 U.S.C. §1324. Reprinted in full in Appendix to Petition for Writ of Certiorari. App. p. 25.

25 U.S.C. §1326. Reprinted in full in Appendix to Petition for Writ of Certiorari. App. pp. 25-26.

C. State Constitutional Provisions:

Article 1, Section 9, North Dakota Constitution.

"Section 9. All courts shall be open, and every man for any injury done him in his lands, goods, person, or

reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."

D. State Statutes:

Chapter 27-19, NDCC. Reprinted in full in Appendix to Petition for Writ of Certiorari. App. pp. 27-31.

Section 32-12-02, NDCC.

"An action respecting the title to property, or arising upon contract, may be brought in the district court against the state the same as against a private person. When such actions are not of a local nature they shall be brought in the county of Burleigh. The plaintiff at the time of commencing such action shall file an undertaking with sufficient surety to be approved by the clerk of court to the effect that he will pay any judgment for costs that may be rendered against him."

VII. STATEMENT OF THE CASE

Petitioner, an Indian tribe, hereafter referred to as Three Tribes, contracted with Respondent, a North Dakota Professional Corporation, hereafter referred to as Wold Engineering, for purposes of designing a water intake system for the Four Bears Village. Work on the project occurred entirely within the boundaries of the Fort Berthold Indian Reservation.

After construction of the system, Three Tribes initiated an action against Wold Engineering alleging the system was negligently designed. Suit was initiated in North Dakota District Court. After answer and assertion

of a counterclaim for breach of contract, Wold Engineering moved to dismiss the action for lack of subject matter jurisdiction. The Honorable Wallace D. Berning, Judge of the District Court, dismissed the case for lack of subject matter jurisdiction. This dismissal was without prejudice, and Three Tribes remains free to reinstitute its action upon compliance with the provisions of the Indian Civil Rights Act of 1968 (25 U.S.C. §1301, et seq.) and Chapter 27-19, NDCC. This decision was unanimously affirmed by the North Dakota Supreme Court. (*Three Affiliated Tribes v. Wold Engineering, et al.*, 321 N.W.2d 510 (N.D. 1982).)

This Court granted Three Tribes' first Petition for Writ of Certiorari, and after review determined that the North Dakota Supreme Court had proceeded under an apparent misapprehension of Federal law. The decision of the North Dakota Supreme Court was vacated. This Court further determined, however, that there may well be justification for the decision if based upon adequate State law considerations which would not be repugnant to the United States Constitution. The case was therefore remanded to the North Dakota Supreme Court with direction to make that determination. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, U.S., 81 L.Ed.2d 113 (1984).

The North Dakota Supreme Court again accepted briefs from all parties, and heard argument. It concluded on remand that its earlier decision may have been incorrect to the extent that it may have been based on federal law, but found that there were adequate state law reasons existing which justify the conditioning of tribal and individual access to state courts upon compliance with the provisions of North Dakota State law. The earlier decision was vacated, and modified. (*Three Affiliated*

Tribes v. Wold Engineering, et al., 364 N.W.2d 98 (N.D. 1985).)

It is from that determination Three Tribes now seeks further review.

VIII. SUMMARY OF THE ARGUMENT

State bars to subject matter jurisdiction in Indian country based upon state constitutions, or statutes, present questions of state law over which the state courts have binding authority. Similarly, a state has a paramount interest in fashioning its own rules of tort and contract law.

North Dakota Courts, consistent with the State Constitution enacted pursuant to a Federal Enabling Act and existing federal law, have no subject matter jurisdiction over civil actions arising in Indian country, and involving Indian litigants. Permission was given by Congress to this State, however, to remove this legal impediment.

When the question was presented how best to remove the legal impediment to jurisdiction, the North Dakota legislature faced a number of options. Rather than select an option objectionable to the Indian people, however, compromise legislation which addressed Indian fears was enacted. This compromise arose from State attempts to satisfy competing interests, and resulted in North Dakota taking less than the whole of the jurisdiction offered.

As with all choices and compromises less than perfection was achieved. The legislation drafted did not answer all questions, and classifications were drawn. However, these classifications were politically based, and were not racially motivated. They arose from the input given by the group which now complains of the results of this com-

promise. The compromise was a good faith and sensible approach to a difficult jurisdictional dilemma.

The result of the compromise was a North Dakota statutory plan allowing individual tribal members, or the Indian tribe, to consent to state jurisdiction. Absent this consent the Courts of this State would be closed to these litigants. Three Tribes argues that by putting tribal Indians individually, or as a group, to this election, and barring the courthouse doors to them should they choose not to consent to jurisdiction, deprives tribal litigants of due process, and equal protection of the law.

One's right to have his tort action heard in an appropriate forum is a species of property, and is an interest protected by due process considerations. A state may not deny a potential litigant access to established forums if this denial is the equivalent of totally denying him an opportunity to be heard upon his claimed right.

Due process recognizes minimal requirements exist before states may adopt procedures which end a litigant's opportunity to be heard. The adequacy of the state law which deprives a party of this property interest must be analyzed in constitutional terms. Of paramount importance in the analysis is the state's own interest in fashioning its rules of tort law. The minimal federal interest existing is simply that individuals must be protected from wholly arbitrary and capricious state action.

Provided a state's action serves a legitimate public purpose, and is enacted in response to identifiable public concerns, the state may erect reasonable procedural requirements for triggering a litigant's right to an adjudication. A state may, in accordance with due process, deny a litigant access to a court for failure to comply with these requirements.

Three Tribes asserts that tribal litigants must have the same right to be heard in state courts for on reservation torts as have all other citizens. This right they now already have, provided, they first agree and consent to be bound by all of the substantive and procedural rules of those courts both as plaintiffs, and as defendants.

The United States Constitution grants to all the equal protection of the laws. Equal protection means that all will receive fair play and substantial justice. Where one group, such as an Indian tribe, is different in fact from all others by virtue of its unique political status, and that group seeks to employ that difference to the detriment of all others, the guarantee of fair play and justice is abused. The Constitution may recognize the unique political status of the Indians and grant to them certain protections. The Constitution will not however be stretched to authorize the Indians to use this recognized status to the obvious and painful detriment of all others.

The North Dakota plan for the orderly assumption of state subject matter jurisdiction draws a classification which is politically based. It carves out for different treatment tribal Indians on their reservations. To do this constitutionally, the State must classify the potential Indian litigants in a manner rationally related to legitimate State objectives. This standard is met when the State acts sensibly, and when it in good faith draws a classification rationally advancing reasonable and identifiable governmental purposes.

North Dakota has determined that, pursuant to its Constitution and federal law existing at the time its laws were enacted, a void in jurisdiction existed in Indian country. Before moving to fill this void, and in order to fill it in an orderly fashion and in accordance with In-

dian wishes, North Dakota has required Indian litigants, either tribally, or individually, to accept the State jurisdiction offered. This is a sensible plan, drawn in good faith, and at the request of tribal Indians in an effort to provide both State and tribal needs for an orderly filling of the void.

The laws of North Dakota violate neither due process, nor equal protection, and were enacted consistent with the compromise sought by the Indians themselves.

The compromise also requires that Indian tribes waive their sovereign immunity. Three Tribes asserts that it may not be required to waive its sovereign immunity as to all suits in order to maintain the suit presently before the North Dakota Court. Governing federal law recognizes the sovereign immunity of Indian tribes. This immunity exists, however, for only so long as Congress allows it to exist. If Congress abrogates that immunity, or provides a method by which that immunity may be abrogated by the states, then sovereign immunity no longer exists. The federal law which allows North Dakota to assume subject matter jurisdiction in Indian country does not expressly terminate this immunity. However, implicit in that law is authority for that termination.

Federal law authorizing state assumption of jurisdiction in Indian country provides that states may assume jurisdiction over any and all civil actions arising in Indian country. The laws of the state shall have general application. Thus, to the extent that a state may recognize the immunity for itself, or for any other governmental entity, the same immunity may exist for an Indian tribe, as an entity. This is a question of state law to be determined in each case by the state courts. This is constitutionally permissible, and was fully authorized by Congress.

Three Tribes further objects to the scope of jurisdiction offered by the State of North Dakota pursuant to this compromise, and asserts it cannot be made to accept this jurisdiction. This question is not now before this Court. Further, the subject matter areas which Three Tribes may have to accept in order to secure the State subject matter jurisdiction over tort actions has been set by State legislation. Nothing at this point stands in the way of further compromise and further negotiation which would limit the scope of this jurisdiction. This is a problem of a political nature, and is not a question ripe for resolution by this Court.

IX. ARGUMENT

A. GROUNDS FOR GRANTING CERTIORARI.

Final judgment from a state supreme court may be reviewed in this Court by certiorari. Whether to grant certiorari rests solely in the discretion of this Court, but this Court should be guided by law and its own rules which govern the granting of this review.

28 U.S.C. §1257(3), provides certiorari may be granted when a state law is drawn into question as being repugnant to the United States Constitution, or to any applicable federal law. Rule 17, Rules of United States Supreme Court, further outlines considerations which weigh in favor of granting review. These considerations are not controlling, and do not measure fully the Court's discretion. However, they do emphasize that review should be granted only in those causes where special and significant reasons exist therefor. Rule 17.1, Rules of the United States Supreme Court.

Three Tribes argues Chapter 27-19, NDCC, denies tribal litigants equal protection of the law, and due process of law. It further argues that the scope of Chapter 27-19, NDCC, and its requirement that tribal entities surrender their sovereign immunity prior to maintenance of a suit, is also contrary to governing federal law. The full scope of Chapter 27-19, NDCC, is governed by considerations of State law enunciated by the North Dakota Supreme Court in *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985). That Chapter, and the North Dakota Supreme Court's decision, fully comport with existing due process and equal protection analysis, and their scope is consistent with current federal law. There are no special, or significant reasons for granting review of the case at bar. Certiorari ought, therefore, be denied.

**B. NORTH DAKOTA'S BAR TO JURISDICTION
IN INDIAN COUNTRY LOCATED WITHIN
THE STATE IS PREMISED ON STATE LAW.**

This Court has noted that to the extent a bar to state subject matter jurisdiction in Indian country is premised on that state's Constitution, or statutes, that bar presents an obvious question of state law over which the state courts have binding authority. *Arizona v. San Carlos Apache Tribe*, U.S., 77 L.Ed.2d 837 (1983). This statement recognizes that states may, consistent with both state and federal law, recognize existing barriers to jurisdiction in Indian country. This state recognition of state jurisdictional barriers is not automatically constitutionally impermissible, and does not automatically create denials of due process or equal protection of the laws to Indian litigants.

North Dakota State courts have the power to hear actions arising in Indian country, but, as a matter of State

law, may not exercise this power until the Indian people themselves ask for an assumption by the State Courts of that jurisdiction. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985). Thus, a bar to state jurisdiction does exist. That bar is premised upon Chapter 27-19, NDCC, and the Constitution of the State of North Dakota. This bar to jurisdiction should be fully recognized, and respected by this Court. As this Court itself noted, if the North Dakota Supreme Court's opinion in this case is based on State law considerations, and not upon a misunderstanding of federal law, the North Dakota Court would be free to reinstate its former judgment on remand, and enforce its State law. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, U.S., 81 L.Ed.2d 113 (1984), footnote 16. Only upon a proper demonstration by Three Tribes that the North Dakota jurisdictional plan violates federal considerations should a Writ of Certiorari to review that bar be granted. Three Tribes has not put forth in its petition, nor can it put forth, any argument which would demonstrate an infirmity in this North Dakota jurisdictional plan.

**C. THE PROCEDURE REQUIRED FOR THE
REMOVAL OF NORTH DAKOTA STATE
BARS TO JURISDICTION IN INDIAN
COUNTRY VIOLATES NEITHER DUE PRO-
CESS NOR EQUAL PROTECTION OF THE
LAW.**

The power to remove the jurisdictional bar present in North Dakota rests entirely in Indian hands. This required procedure violates neither due process nor equal protection of the laws. Chapter 505, U.S. Statutes at Large, 67, also known as Public Law 280, authorized the various states to assume all civil and criminal jurisdiction in

Indian country. This was a one-sided jurisdictional offer, and states such as North Dakota, under §6 of that law, had the power to unilaterally take the full jurisdiction offered. Initially, the State legislature sought such a unilateral take over, but the State's Indian residents objected. Rather than heedlessly imposing its will then, the State listened to the concerns of the various Indian tribes, and took a compromise jurisdictional approach. The State extended the full of its civil subject matter jurisdiction to the Indian people, but conditioned it upon tribal, or individual acceptance of the same. Chapter 27-19, NDCC; *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985). The effect of this compromise was to create the classification of potential Indian litigants on the reservation, and potential non-Indian litigants on the reservation. The jurisdiction of the State court would not extend to any action involving any Indian litigant, either as plaintiff or defendant, until such time as the Indians themselves sought it out. At the same time, State jurisdiction would extend to actions involving only non-Indian litigants. Three Tribes asserts this classification is racially motivated and denies a discrete minority the exercise of a fundamental civil liberty. This, it argues, denies Indian litigants due process and equal protection of the law.

State bars to jurisdiction in Indian country are historical, and are deeply rooted. See, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Rice v. Olson*, 324 U.S. 76 (1945). They are based upon longstanding and ever changing political considerations which recognized the inherent power Indians in Indian country have for making their own rules, and being governed by them. *Williams v. Lee*, 358 U.S. 217 (1959). Hence, the bars to jurisdiction existing in North Dakota are historical and political, and

are not racially based. They were not created or designed to unfairly discriminate against a people. Recognition of these political differences, and the disparate treatment which results is not automatically constitutionally offensive. *Morton v. Mancari*, 417 U.S. 537 (1974). Further, this Court has held that jurisdictional treatment which results in denying an Indian plaintiff a forum to which a non-Indian has access is to be expected and is neither exceptional, nor objectionable. *Fisher v. District Court*, 424 U.S. 382, at 390-391 (1976).

The North Dakota Court has recognized as a matter of State law the existence of a jurisdictional bar. This bar is not absolute, is politically based, and may be removed at any time by proper tribal or individual Indian action. The mechanisms set up for this removal came from Indian requests and Indian input into the State legislative process. Chapter 27-19, NDCC, was the hybrid result of what State legislators were told by Indian spokesmen the Indians themselves desired. (See discussion of Legislative History, *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985).) This compromise jurisdictional setting has been in place for over twenty years, and all parties seemingly were able to satisfy their needs under it for that period of time. Only now, when all of the ramifications of what it had asked for twenty years ago has fully developed, does Three Tribes complain.

1. The North Dakota jurisdictional plan does not deprive Indian litigants of due process.

Three Tribes is correct in asserting that a state must not deny a litigant access to state created forums for resolution of state created tort claims. A litigant's right to have his tort claim heard in an appropriate state forum is a species of property protected by due process considera-

tions. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). However, nothing entitles every civil litigant to a trial on the merits in every case. The state's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, except the minimal federal interest which exists to protect citizens from wholly arbitrary and irrational state action. *Martinez v. California*, 444 U.S. 227 (1980). The state may erect any reasonable procedural requirements for triggering the right to an adjudication. And, when a litigant fails to comply with those requirements, due process is not violated when the state refuses to hear that litigant's claim. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

In the case at bar, Three Tribes has a property interest in its tort action against Wold Engineering. The State of North Dakota has created, consistent with its conception of State limits to jurisdiction in Indian country, a procedure by which that action can be brought. Three Tribes may bring its action after compliance with Chapter 27-19, NDCC. This procedural requirement is neither arbitrary nor irrational, nor was it put in place to deny a discrete minority its civil liberties. Since the requirement was forged in the compromise between the State and the Indian tribes, it can hardly be seen as arbitrary state action in which the Indian people had no voice, and designed to deny Indians their right of access. Further, since the State of North Dakota is being asked to fill a jurisdictional void, some reasonable mechanisms must exist to help the State fill the void in an orderly fashion. Chapter 27-19, NDCC, provides these mechanisms and is thus not irrational but exists to satisfy that purpose. That Three Tribes, and individual tribal litigants, chose to not follow these procedural requirements does not create a denial by the State

of a tribal or individual Indian's property right to have tort actions heard. Due process is not denied Three Tribes by the reasonable requirements imposed by Chapter 27-19, NDCC.

2. The North Dakota jurisdictional plan does not deny Indian litigants equal protection of the law.

"The state's obligations under the 14th Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie v. Connecticut*, 401 U.S. 371, at 380 (1971).

The protection urged by Three Tribes in this case is that it be allowed to sue a non-Indian litigant in State court. At the same time, Wold Engineering, a non-Indian litigant, which had asserted a counterclaim against Three Tribes would be denied access to that same court for resolution of an issue which arose in the same case. The protection afforded by such a society which would allow this to occur is obvious, but it is hardly equal, and it is not in keeping with the values held by our free society.

In *Plyler v. Doe*, 457 U.S. 202 (1982), this Court noted:

"The Equal Protection Clause directs that 'all kinds similarly circumstanced shall be treated alike.' *F.S. Royster Guano Co. v. Virginia*, 253 US 412, 415, 64 LEd 989, 40 S Ct 560 (1920). But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' *Tigner v. Texas*, 310 US 141, 147, 84 L Ed 1124, 60 S Ct 879 (1940). The initial discretion to determine what is 'different' and what is 'the same'

resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications which roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216.

Indians reside in a unique political environment. Residing in this unique environment means they are not people similarly circumstanced. The Indian world, being different in fact, need not be treated in law as though it were the same as the non-Indian world. From the very outset of this Nation's history the Indian world has not been treated in law as though it were the same as the non-Indian world. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The determination that this Indian world is different has been made in the Constitution. U.S. Const., Art. I, §8, Cl. 3. The Congress, and the State Legislature must have substantial latitude to establish the classifications that roughly approximate the nature of the problems perceived, and to accommodate the interests involved. North Dakota's response to the jurisdictional problems it faced in relation to the unique Indian environment present within its borders was to enact a legislative plan which approximates the nature of the problems perceived by both the State and the Indian tribes.

The unique legal status of the Indian tribes under federal law permits federal legislation which would single

Indian tribes out for special treatment. That Indians have different standing under the law is deemed to be politically based and therefore not Constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535 (1974). Under this unique legal status Indians may have a different standing than non-Indians for purposes of jurisdiction. This jurisdictionally different status may result in the denial of a forum to Indian litigants which is otherwise available to non-Indian litigants. This is to be expected and is not Constitutionally offensive. *Fisher v. District Court*, 424 U.S. 382 (1976).

Three Tribes argues the State action which singled Indians out for special treatment violates the constitutional guarantee of Equal Protection.

This Court has held, however, in response to a similar jurisdictional challenge to a Washington law similar to North Dakota's:

"It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*, 417 US 535, 551-552, 41 L Ed 2d 290, 94 S Ct 2474. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub L 280. And many of the classifications made by Chapter 36 are also made by Pub L 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, e.g., *United States v. McBratney*, 104

US 621, 26 L Ed 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. See e.g., *United States v. Wheeler*, 435 US 313, 55 L Ed 2d 303, 98 S Ct 1079. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power." *Washington v. Yakima Indian Nation*, 439 U.S. at 500-501.

North Dakota, like Washington State, does not enjoy the same unique relationship with the Indian tribes as does the federal government. However, Chapter 27-19, NDCC, is not simply another state law. As Washington's Chapter 36, Chapter 27-19, NDCC, was enacted in response to a federal measure designed to readjust the allocation of jurisdiction over Indians. The North Dakota law creates an obligation for the State to accept responsibility for this allocation, and places the burden upon the Indian tribe to make effective that allocation. §27-19-02, NDCC, and §27-19-05, NDCC. North Dakota, as Washington, acted under the explicit authority granted by Congress. North Dakota's action, like Washington's, is not constitutionally impermissible. No suspect racial classification has been made by the State, and no fundamental rights have been abridged.

This Court, in applying equal protection analysis to this State action need only seek assurance that the action bears a fair relationship to a legitimate public purpose and reasonably advances that purpose. *Schweiker v. Wilson*, 450 U.S. 221 (1981). Here, such a fair relationship exists, and the Indian tribes received precisely the jurisdictional protections they requested.

Equal protection is satisfied when the State acts sensibly, and in good faith. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Blackmun, J., concurring opinion.).

The State's purpose in enacting Chapter 27-19, NDCC, was to fill the vacuum in jurisdiction existing in Indian country. This is a legitimate state purpose and was fully authorized by Public Law 280. Public Law 280 envisioned State assumption of jurisdiction as advancing interests in Indian self government, and enrolling Indians as fully participating members of modern society. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The method adopted by North Dakota requires Indian litigants, either tribally or individually, to first consent to State court jurisdiction. This consent provision was asked for by Three Tribes, and other Indian spokesmen, and would obviously seem to be what even they thought was a reasonable requirement to advance their cause. The consent provision is also sensible and workable. Inasmuch as the State could unilaterally have taken all subject matter jurisdiction without any Indian consent, providing them with a voice in their own destiny is an act of good faith for which the State should not be criticized. The legislation and classification passes all of the requirements this Court has imposed on legislation which creates classifications. The legislation thus does not deny Three Tribes equal protection of the laws.

Three Tribes argues that somehow the North Dakota legislative blueprint and judicial decision work to harm a discrete and insular minority and therefore must advance a compelling state interest. But, the North Dakota decision is not racially motivated. The decision merely reflects the actual political differences presented. The legislation is not designed to disadvantage the Indian tribes. Rather, the legislation was passed in direct response to

Congressional mandates and to the requests made by the Indian tribes.

Chapter 27-19, NDCC, advances a legitimate public purpose, was designed to accommodate Indian needs and requests, and is not racially motivated. Therefore, it need not be subjected to strict scrutiny to determine if it advances a compelling state purpose. The North Dakota law furthers legitimate purposes in a rational manner.

The Equal Protection Clause, in relation to the right of access to a court, guarantees a right to a meaningful opportunity to be heard within the limits of practicality. The clause guards against particular laws which may jeopardize this right. *Boddie*, 401 U.S. at 380-381.

Such an opportunity has not been denied to Three Tribes. However, a condition has been placed upon it. That condition is that the Indian tribes must ask the State to accept jurisdiction. §27-19-02, NDCC, or §27-19-05, NDCC. Once the condition is met, all meaningful opportunities to be heard within the limit of practicality will be granted. There is no State created barrier jeopardizing this right. The only barrier existing rests with Three Tribes itself which wishes to stay free of State court as a defendant, but also wishes to use the State courts when, as a plaintiff, it will suit its purpose.

Three Tribes argues the power to pick a forum when and if it would allow it to recover its full claim if successful. At the same time, Three Tribes insists upon retention of its protected status in order to deny all others the right to bring Three Tribes into that same forum as a defendant. Such gamesmanship is totally unjustifiable.

The law of North Dakota, and the decisions of the North Dakota Supreme Court deny to no-one equal pro-

tection. Certiorari on these grounds must therefore be denied.

D. REQUIRING AN INDIAN TRIBE TO FOREGO ITS SOVEREIGN IMMUNITY PRIOR TO INSTITUTING STATE COURT ACTION IS NOT INCONSISTENT WITH FEDERAL LAW.

The North Dakota Supreme Court has ruled that before Three Tribes brings its action in State court it must first consent to State court subject matter jurisdiction, and make itself, and its property, subject to State court jurisdiction. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985). This holding is not inconsistent with governing federal law.

Indian tribes are subject to the plenary authority of Congress. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). With respect to this authority, this Court has noted that all aspects of Indian sovereignty are subject to defeasance by Congress. *Escondido Mutual Water Co. v. LaJolla Indians*, 466 U.S., 80 L.Ed.2d 753 (1984). Included in this would be the power of Congress to strip Indian tribes, as sovereign entities, of their sovereign immunity from tort. The divestiture of this sovereignty may occur by treaty, or statute, or by a necessary implication resulting from their dependent status. *United States v. Wheeler*, 435 U.S. 313 (1978). This Court in *Wheeler* further noted that implicit divestiture of sovereignty occurs in those instances involving relations between an Indian tribe, and non-members of that tribe. *United States v. Wheeler*, 435 U.S. at 326.

Congress afforded the various states an opportunity to assume civil subject matter jurisdiction in Indian country by its enactment of Public Law 280. North Dakota could

assume jurisdiction in accordance with the Act by virtue of §6. The Act provided that the State law shall:

"... have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." Public Law 280, §4(a).

This same language was later engrafted into 25 U.S.C. §1322(a), which amended the provisions of Public Law 280.

The necessary implication of that language is that to the extent a State may recognize sovereign immunity, or governmental immunity, the Indian tribes within that State shall enjoy it. If sovereign immunity is not recognized, the Indian tribes will not be able to rely upon it. If North Dakota laws of general application shall have the same force and effect in Indian country as elsewhere within the State, then it must be noted that the State Constitution recognizes sovereign immunity only for the State of North Dakota itself. Article 1, §9, N.D. Const. All governmental immunity for other governmental entities in the State has been rejected. *Kitto v. Minot Park Dist.*, 224 N.W.2d 795 (N.D. 1974). Indian tribes would not be able to shield their liability in North Dakota for their wrongs by virtue of the current State of North Dakota law. Further, even the State of North Dakota itself has waived its sovereign immunity for actions on contracts. Section 32-12-02, NDCC. Wold Engineering asserts in its counterclaim a contract action. Thus, the general laws of North

Dakota would require all entities, even the State itself, to respond to this type of contract action brought against it. Three Tribes, if to accept the jurisdiction North Dakota has made available, and consistent with the plain language of Public Law 280, must recognize that it cannot hide behind the cloak of sovereign immunity in this action. This requirement is not inconsistent with the provisions or implications behind Public Law 280, and makes applicable the general laws of the State to all actions involving Indian litigants.

Three Tribes further asserts that the decision of the North Dakota Court may cause the tribe to lose its power to control its own destiny since Chapter 27-19, NDCC, would authorize the State Courts to assume subject matter jurisdiction over other enumerated actions. Section 27-19-08, NDCC. Three Tribes argues it must control these actions or it will lose its ability to govern and protect rights reserved by Federal law. Admittedly this may occur under the current Chapter 27-19, NDCC, jurisdictional plan, and, to this extent, the fears of Three Tribes are well founded.

Two facts should be noted at this point, however. First, the case before this Court is not a case arising in the enumerated categories. The case at bar is simply a tort and breach of contract action and counterclaim. Thus, these considerations are not properly in controversy, and this Court should refrain from granting certiorari to review speculative matters. Second, nothing at this time would prevent Three Tribes or any other tribe from approaching the State legislature when it is next in session and seeking some limiting power on State jurisdiction in the enumerated categories. The State of North Dakota has made an offer only, and as in all compacts, before the contract is final, negotiations may continue.

The law of North Dakota requiring tribal waiver of sovereign immunity is consistent with federal law. Other considerations raised by Three Tribes in its Petition are not now properly before this Court. Certiorari on these two grounds should therefore not be granted.

X. CONCLUSION

Review of a State Supreme Court's decision by Writ of Certiorari should be sparingly granted, and then only in those instances where a petitioner has demonstrated the clear error in the State Court's ruling. Three Tribes has failed to demonstrate, nor could it demonstrate, the error in the North Dakota Supreme Court's opinion in the case at bar. Certiorari ought therefore be denied.

Wold Engineering requests the Writ of Certiorari be denied.

Respectfully submitted this 19th day of July, 1985.

BOSARD, McCUTCHEON & RAU, LTD.

200 Heritage Place

P.O. Box 939

Minot, North Dakota 58702-0939

By: **GARY H. LEE**

Attorneys for Wold Engineering

JOINT APPENDIX

③
No. 84-1973

Supreme Court
FILED

DEC 6 1985

JOSEPH F. SPANIEL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,

Petitioner,

v.

WOLD ENGINEERING, P.C., and
SCHMIDT, SMITH & RUSH,

Respondents.

On Certiorari to the Supreme Court of North Dakota

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 20, 1985
PETITION GRANTED OCTOBER 15, 1985

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No. 82-629

In The
Supreme Court of the United States
October Term, 1983

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P. C., A NORTH
DAKOTA PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

JOINT APPENDIX

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of
the Fort Berthold Reservation,
Plaintiff,

vs.

Wold Engineering, P.C.,
a North Dakota Professional Corp.,
Defendant.

COMPLAINT

Case #
JURISDICTION

I.

Defendant is a Professional Corporation doing business within the State of North Dakota and organized under the Laws of the State of North Dakota.

—o—
STATEMENT OF CASE

II.

That the Plaintiff contracted with Defendant to provide Plaintiff with expert Engineering services for the construction of a year around water intake facility from Lake Sakakawea for the 4-Bears Village.

III.

That the water intake system designed by Defendant is not fit nor functional for the purposes and location intended.

IV.

That Defendant was negligent and incompetent in the designing of a year round water intake system.

V.

That because of Defendant's negligence and faulty design the water intake system has frozen up and has not functioned for each of the first three winters of its exist-

ence, namely the winters of 1977-1978, 1978-1979, and 1979 (sic) -1980.

VI.

That because of the freezing up of the water intake system Plaintiff's (sic) have been without water for considerable lengths of time and with raw unhealthy water supplies for the combined winter months of 1977-1978, 1978-1979, and 1979-1980.

VII.

That to convert the water intake system to a year around facility would cost \$350,000.00.

VIII.

That Plaintiffs have paid the sum of \$75,000.00 to rehabilitate the system to keep it functioning.

WHEREFORE, PLAINTIFF PRAYS THIS
COURT TO GRANT:

1. This Court to grant a judgment against Defendant in the sum of \$425,000.00 together with costs, disbursements and reasonable attorneys fees.

Dated this 20th day of March, 1980.

JOHN O. HOLM
Attorney for Plaintiff
17 Second Ave. West
Dickinson, North Dakota 58601

John O. Holm

Civil No. —

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a
North Dakota Professional Corp.,

Defendant.

ANSWER AND COUNTERCLAIM

NOW COMES the Defendant Wold Engineering,
P. C., and for its answer to the Plaintiff's Complaint, al-
leges:

1.

That the Complaint fails to state a claim against this
Defendant upon which relief can be granted.

2.

Except as hereinafter admitted, modified, qualified or
explained, this answering Defendant, Wold Engineering,
P. C., denies all of the allegations of the Complaint.

3.

Admit Paragraphs I and II of the Complaint.

4.

Deny Paragraphs III, IV, V and VI of the Complaint.

5.

Deny that this answering Defendant has knowledge or
information sufficient to form a belief as to the truth of
Paragraph VII of the Complaint, and therefore denies the
same; alleges that such allegation is a conclusion on the
part of the pleader, is not germane to and is without and
beyond the gravamen of the complaint; is not a valid and
proper measure of damage with respect to the alleged
cause of action set forth in the Complaint.

6.

With respect to Paragraph VIII of the Complaint,
these Defendants deny that they have knowledge or be-
lief sufficient to form a belief as to the truth of the same,
and therefore deny the same; further allege that if the
said Plaintiffs have expended any sum as alleged in said
paragraph for such rehabilitation, any and all events
which caused or required such rehabilitation were not
caused by any act or omission on the part of this Defend-
ant, but were caused by others over whom this Defendant
had and has no control; that the Plaintiff wholly failed
to guard against any acts of others which may have caused,
or led to, any damage to any of said installation; that the
Plaintiff wholly failed in any manner whatsoever to take
adequate and sufficient steps and precautions to protect
the installation, and any damage to such installation
caused by the acts of others were due proximately to the
carelessness and negligence of the Plaintiffs in failing to
protect such installation.

7.

Further answering, this Defendant specifically denies that this answering Defendant was in any way, either by commission or omission, negligent with respect to any design work which this Defendant did with respect to the structure described in the Complaint; that the plans and specifications as prepared by this Defendant were in all things proper and correct for the scope of the project to be undertaken according to the instructions of the Plaintiff and the design of this answering Defendant was in no manner whatsoever defective. Further, this answering Defendant alleges that the damages complained of by the Plaintiff, if in fact sustained by the Plaintiff, were caused by acts or omissions of others over whom this Defendant had no authority or control, and were caused by the wilful carelessness and negligence on the part of the Plaintiff in protecting the completed installation.

COUNTERCLAIM

FURTHER ANSWERING, and as and (sic) for a counterclaim against the Plaintiff, this Defendant alleges that the Plaintiff owes to the Defendant the sum of Four Thousand Five Hundred Dollars (\$4,500.00) as the balance due on the engineering fees due this Defendant from the Plaintiff with respect to the engineering services performed by this Defendant in connection with the construction of the structure set forth in the Plaintiff's Complaint, no part of which balance due has been paid to this Defendant, even though these Defendants have demanded the same from the Plaintiff who refused to pay.

WHEREFORE, this answering Defendant prays the Court that the Plaintiff take nothing in the above entitled action and that the Plaintiff's action be dismissed; that this answering Defendant have judgment against the Plaintiff in the sum of Four Thousand Five Hundred Dollars (\$4,500.00) as prayed for in this Defendant's Counterclaim, together with interest thereon, and that this answering Defendant have its costs and disbursements, and such other relief as to the Court may seem just.

Dated at Minot, North Dakota, this 15th day of May, 1980.

BOSARD, McCUTCHEON, HOLUM &
RAU, LTD.

Attorneys for Defendant

200 Heritage Place

P. O. Box 939

Minot, North Dakota 58701

BY: /s/ Hugh McCutcheon

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of
the Fort Berthold Reservation,
Plaintiff,

vs.

Wold Engineering, P. C., a
North Dakota Professional Corp.,
Defendant.

ANSWER TO DEFENDANT'S COUNTERCLAIM

NOW COMES the above-named Plaintiff and for their
ANSWER to Defendant's Counterclaim and states it de-
nies each and every allegation contained in the Defend-
ant's Counterclaim.

WHEREFORE, Plaintiff prays that Defendant's
Counterclaim be dismissed with prejudice and costs and
attorneys fees for Plaintiff and any other relief the Court
deems necessary and just.

Dated this 21st day of May, 1980, Dickinson, North
Dakota.

/s/ John O. Holm
Attorney for Plaintiff
17 2nd Ave W.
Dickinson, N. D. 58601

Civil No. 46392
IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,
Plaintiff,

vs.

Wold Engineering, P. C.,
a North Dakota Professional Corporation,
Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,
Third-Party Defendants.

THIRD-PARTY COMPLAINT

The above named Defendant and Third-Party Plain-
tiff, by its attorneys, as and for a Third-Party Complaint
against the Third-Party Defendants, alleges:

I.

Plaintiff, Three Affiliated Tribes of the Fort Berth-
old Reservation, has filed against the Defendant, Wold En-
gineering, P. C., a North Dakota Professional Corpora-
tion, a Complaint, a copy of which is attached hereto as
Exhibit "A".

II.

As appears from the Complaint, the Plaintiff alleges
that the Plaintiff contracted with the Defendant to pro-

vide Plaintiff with expert engineering services for the construction of a year round water intake facility from Lake Sakakawea for the Four Bears Village; that the water intake system designed by the Defendant is not fit nor functional for the purposes and location intended; that Defendant was negligent and incompetent in the designing of a year round water intake system; that the system has frozen up and not functioned for each of the first three winters of its existence, namely the winters of 1977-1978, 1978-1979, and 1979 (sic) -1980. It is further alleged in said Complaint that by virtue of freezing up of the water intake system the Plaintiff has been without water for a considerable length of time, and with raw, unhealthy water supplies for the winter months of 1977 through 1980. It is further alleged in said Complaint that Plaintiff has paid the sum of Seventy-five Thousand Dollars (\$75,000.00) to rehabilitate the system to keep it functioning, and that to convert the water intake system to a year round facility would cost Three Hundred Fifty Thousand Dollars (\$350,000.00).

The Defendant and Third-Party Plaintiff has, among other things, denied the allegations of the Plaintiff's Complaint.

III.

That the Defendant, Schmidt, Smith & Rush, was employed by the Defendant, Wold Engineering, P. C., for the purpose of preparing design, plans and specifications for all of the electrical and heating work required with respect to the project described in the Complaint, which design was intended to keep said water intake system from freezing during winter months; that it was the duty of the

said Third-Party Defendant, Schmidt, Smith & Rush, to use due care in its design of the electrical and heating system, and to specify good and proper equipment for the ordinary purposes for which such equipment was intended, and that such duty ran to the Third-Party Plaintiff and to any and all other parties who would use and rely upon the design and equipment so specified. That this Defendant and Third-Party Plaintiff followed and relied upon the skill of the said Third-Party Defendant, Schmidt, Smith & Rush, in said design and equipment specifications, and that the Third-Party Defendant, Schmidt, Smith & Rush, breached its duty to this Defendant and Third-Party Plaintiff in that the said Third-Party Defendant, Schmidt, Smith & Rush, was careless and negligent in that the design and specifications which it provided to the Third-Party Plaintiff were insufficient and defective and did not meet the purpose for which such design was intended.

IV.

That the Third-Party Defendant, Acton Construction Co., Inc., entered into a contract with the Plaintiff to furnish all of the materials, supplies, machinery, equipment, tools, superintendence, labor, and other accessories and services necessary to complete the said project referred to in the Complaint in accordance with the conditions and prices stated in the Proposal, the General Conditions, Supplemental General Conditions and Special Conditions of the Contract, including all maps, plats, blueprints and other drawings and printed or written explanatory matter thereof, all of which were made part of the contract; that the said Third-Party Defendant, Acton Con-

struction Co., Inc., wholly failed to keep said project in repair as required by the contract and within the time therein provided; that if any materials in said project were defective, the same were supplied by the said Third-Party Defendant, Acton Construction Co., Inc., and for which said contractor is liable to the Plaintiff; that the said contractor in attempting to repair work performed by the contractor negligently delayed the performance thereof, and that such negligent delay was a proximate cause of the damage sustained by the Plaintiff; that the said Third-Party Defendant, Acton Construction Co., Inc., or its subcontractors, failed to comply in all things with the contract provisions, the plans and specifications, general conditions and special conditions and that such contractor furnished faulty equipment and defective workmanship in the performance of its contract.

V.

In the event that the Plaintiff should recover any damage from the Defendant and Third-Party Plaintiff for damages as alleged in the Complaint, then the Defendant and Third-Party Plaintiff is entitled to full indemnity and/or contribution from the said Third-Party Defendants.

WHEREFORE, Wold Engineering, P. C., Defendant and Third-Party Plaintiff, demands judgment against the Third-Party Defendants for all sums by way of indemnity and/or contribution that may be adjudged against it in favor of the Plaintiff, together with costs and disbursements herein and such other and further relief as the Court may deem just and equitable.

Dated at Minot, North Dakota, this 20th day of May, 1980.

BOSARD, McCUTCHEON, HOLUM
& RAU, LTD.

Attorneys for Defendant and Third-
Party Plaintiff, Wold Engineering,
P. C.

200 Heritage Place

P. O. Box 939

Minot, North Dakota 58701

By: /s/ Hugh McCutcheon

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a North Dakota
Professional Corporation,
Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,
Third-Party Defendants.

ANSWER OF THIRD-PARTY DEFENDANT
SCHMIDT, SMITH & RUSH

I.

Schmidt, Smith & Rush, Inc. denies all the allegations of the Complaint and of the Third-Party Complaint, except as herein expressly admitted, qualified or explained.

II.

Responding to paragraph 3 of the Third-Party Complaint, Schmidt, Smith & Rush admits that it was employed by the Defendant, Wold Engineering, P. C. for the purpose of designing and preparing plans and specifications

for electrical and heating work required with respect to the project described in the complaint.

III.

Schmidt, Smith & Rush denies that it was careless and negligent and denies that its design and specifications were insufficient and defective.

DATED at Minot, North Dakota, this 12th day of August, 1980.

PRINGLE & HERIGSTAD, P. C.
/s/ Jan M. Sebby
Attorney for the Third-Party Defendants
Box 1000
Minot, ND 58701

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of the
Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., A North Dakota
Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,
Third-Party Defendants.

ORDER DISMISSING THIRD-PARTY COMPLAINT
AND GRANTING SUMMARY JUDGMENT

The Third-Party Defendant, Acton Construction Co., Inc., (Acton) having moved for dismissal of the Third-party Complaint against it; for a Summary Judgment in its favor; and alternatively, for separate trial; and Acton having served and filed said Motions and accompanying Affidavit and Brief as required by Rule 2.2(c) of the North Dakota Rules of Court; and the time for file of Answer Briefs having expired; said Motions are therefore deemed submitted and taken under advisement by the Court; and, pursuant to Rule 3.2(d) of the Rules of Court, failure to file a Brief by an adverse party being an admission that, in the opinion of counsel, that the motions are meri-

torious; and the Court having examined the Pleadings and other documents and records filed herein; and the Court being fully advised in the premises:

The Court finds that the Third-Party Complaint fails to show any liability of Third-Party Defendant Acton to Third-Party Plaintiff for any relief that might be granted under Plaintiff's claim for relief in the main action.

The Court finds that there is no genuine issue as to any material fact in the Third-Party action against Acton and that Acton is entitled to Judgment as a matter of law.

THEREFORE, IT IS ORDERED

1. That the Motion to Dismiss be and is granted and the Third-Party Complaint against Acton Construction Co., Inc., be and is stricken for failure to state a claim.

2. That Third-Party Defendant, Acton Construction Co., Inc.'s, Motion for Summary Judgment be, and it hereby is, granted.

3. That the Clerk of this Court enter a Judgment dismissing the Third-Party Complaint against Acton Construction Co., Inc., with prejudice, and awarding Acton its costs and disbursements against the Third-Party Plaintiff.

4. That the Motion for separate trial is denied.

DATED this 12th day of October, A. D., 1981.

/s/ Wallace D. Berning,
Judge of the District Court

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICTSTATE OF NORTH DAKOTA
COUNTY OF WARDThree Affiliated Tribes of the
Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a North Dakota
Professional Corporation,
Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith and Rush,
Third-Party Defendants.

MEMORANDUM OPINION

FACTS

The Plaintiff seeks to recover from the Defendants for defective workmanship on a project within the Fort Berthold Indian Reservation. The action is based upon alleged negligence. At the commencement of trial proceedings, the Defendant, Wold Engineering, submitted a Motion to Dismiss for Lack of Jurisdiction, citing the provisions of 25 U. S. C. §§ 1322 and 1326 and 27-19-01 NDCC. It was stipulated by both parties that a tribal election was not held to ratify the proceedings in this case. The Plaintiff resists the Motion contending that it was not the intention of the Indian Civil Rights Act to apply to tribal

governments such as the Plaintiff. The Court, after considering the Motion, recessed the trial and invited briefs from parties, both which replied. The Court grants the Motion to Dismiss.

LAW

Article XIII, Section 1(2) of the North Dakota Constitution disavows jurisdiction over all Indian land, subject to certain qualifications. The provisions of 25 U. S. C. §§ 1322 and 1326 gives authority to states to assume jurisdiction *with a consent of the tribe* occupying a particular Indian country. Later such jurisdiction would be "over any or all" civil actions arising within such Indian country. Section 1322 states further that those civil laws of a state assuming jurisdiction that are of "general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within the state". Section 1326 requires a special election as a condition to state jurisdiction. The State of North Dakota in the provisions of Section 27-19-01 has extended jurisdiction "over all civil causes of action which arise on Indian reservations." This extension of jurisdiction again is subject to the provisions of a tribal election. The Plaintiff contends that these provisions relate only to the rights of individuals. He cites certain parts of the federal statute relating to "private persons or private parties". The Court does not agree with that interpretation and finds that the quoted excerpts are only descriptive of a general category of laws such as which would be applicable (i. e., negligence) in this case.

The most recent consideration of this problem by the state Supreme Court has been the case of the *United States ex rel. Hall v. Hanson*, 303 N. W. 2d 349 which held that state jurisdiction over "events" occurring on reservation lands may be obtained only by state and tribal compliance with the afore-cited provisions of federal law. The Court cites its previous case of *Nelson v. Dubois*, 232 N. W. 2d 54 which stated that state jurisdiction over Indian country may be obtained only by state and tribal compliance with Sections 1322 and 1326. In neither case was there a qualification relating to tribal persons vis-a-vis tribal governments. The Plaintiff would vitiate the *Hanson* case by concluding that the decision was proper because the area of trespass on federal trusts land has been preempted by federal law. A close reading of the case does not corroborate the Plaintiff's contentions. Accordingly, I hereby grant the Defendant's Motion to Dismiss this action without prejudice to proceed further upon compliance with the appropriate statutes is effected.

Dated at Minot, North Dakota, this 11th day of January, 1982.

BY THE COURT:
/s/ Wallace D. Berning
District Judge

cc: Ct file

J Holm
H McCutcheon
J Sebby
P Kloster

District Court
Fifth Judicial District

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Three Affiliated Tribes of the Fort Berthold Reservation,
Plaintiff and Appellant

v.

Wold Engineering, P.C., a North Dakota Professional Corporation,
Defendant, Third-Party Plaintiff and Appellee

v.

Schmit, Smith & Rush,
Third-Part Defendant

Civil No. 10,172
(Filed March 13, 1985)

Appeal from the District Court of Ward County, Northwest Judicial District, the Honorable Wallace Berning, Judge. Judgment affirming rendered by this Court July 1, 1982, vacated by the United States Supreme Court and remanded to this Court for further proceedings May 29, 1984.

OPINION RENDERED JULY 1, 1982, VACATED, JUDGMENT OF DISTRICT COURT MODIFIED, AND CASE REMANDED FOR FURTHER PROCEEDINGS.

Opinion of the Court by Erickstad, Chief Justice.

John O. Holm, 17 Second Avenue West, Dickinson, ND 58601, and Raymond Cross, P. O. Box 220, New Town,

ND 58763, for plaintiff and appellant; argued by John O. Holm.

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Three Affiliated Tribes v. Wold Engineering

Civil No. 10,172

ERICKSTAD, Chief Justice.

On July 1, 1982, this Court, in a unanimous opinion, affirmed the judgment of the District Court of Ward County. Three Affiliated Tribes of the Fort Berthold Indian Reservation (Affiliated) had appealed from a judgment of that court dismissing the complaint for lack of subject matter jurisdiction. The basic issue on appeal was whether or not the state court had subject matter jurisdiction over a civil action arising within the exterior boundaries of the Fort Berthold Indian Reservation in which Affiliated was the plaintiff and the defendants were non-Indians. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 321 N.W.2d 510 (N.D. 1982).

Following an application for a writ of certiorari from the United States Supreme Court, that Court granted the writ, received briefs from the parties, heard arguments of counsel, and on a seven-to-two basis on May 29, 1984, vacated the judgment of our Court and remanded the case for further proceedings not inconsistent with its opinion.

In its opinion, the majority, speaking through Mr. Justice Blackmun, said:

"In sum, then, no federal law or policy required the North Dakota courts to forgo the jurisdiction recognized in *Vermillion* [*v. Spotted Elk*, 85 N.W.2d 432 N.D. 1957)] in this case. If the North Dakota Supreme Court's jurisdictional ruling is to stand, it must be shown to rest on state rather than federal law.

. . . .

"If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

"Here, a careful reading of the North Dakota Supreme Court's opinion leaves us far from certain that the court's present interpretation of Chapter 27-19 does not rest on a misconception of federal law. In determining the role played by that court's understanding of federal law, we are guided by the jurisdictional principles that have come to govern our calculation of adequate and independent state grounds. In *Michigan v. Long*, 463 U.S. —, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this Court ruled that 'when . . . a state court decision fairly appears . . . to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.' *Id.*, at —, 103 S.Ct., at 3476. Although petitioner's constitutional challenge to the North Dakota Supreme Court's judgment means that we do not face a question of our own jurisdiction, see *Standard Oil Co. v. Johnson*, 316 U.S., at 482-483, 62 S.Ct., at 1169, we

believe that the same general interpretive principles properly apply here. The North Dakota Supreme Court's opinion does state that the North Dakota Legislature 'totally disclaimed jurisdiction over civil causes of action arising on an Indian reservation,' but it adds that the legislature did so 'pursuant to Public Law 280,' '[u]nder the authority of Public Law 280,' and 'under explicit authority granted by Congress in the exercise of its federal power over Indians.' 321 N.W.2d, at 511-513." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, — U.S. —, —, 104 S.Ct. 2267, 2276-77, 81 L.Ed.2d 113, 124-25 (1984).

In essence, what the United States Supreme Court is telling us is that the courts of our state have jurisdiction to try this dispute, because jurisdiction was acquired through the exercise of jurisdiction prior to the amendments of Public Law 280 by Congress in 1968, notwithstanding the contract between the United States and North Dakota created by Section 4, subdivision 2, of the Congressional Enabling Act, passed February 22, 1889,¹ and the second part of Section 203 of Article XVI of the North Dakota Constitution as it read before amendment in 1958.²

In other words, the Court is saying that by exercising jurisdiction in *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957), a case involving a tort action brought by an Indian against another Indian, arising out of an automobile accident which occurred on a highway within the exterior boundaries of an Indian reservation in this state, our state courts acquired jurisdiction which was not affected by the amendments to Public Law 280 in 1968 by the enactment of the Indian Civil Rights Act (Pub.L. 90-284, §§ 401, 402, 406, 82 Stat. 78-80, codified at 25 U.S.C.

§§ 1321, 1322, 1326),³ notwithstanding that Section 1322 required the consent of the tribe occupying the particular Indian country, notwithstanding that in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), the United States Supreme Court said that the Supreme Court of Arizona had no jurisdiction over an action on a debt arising on the Navajo Reservation, brought by a non-Indian against an Indian couple, and notwithstanding that the reasoning applied in *Vermillion*, that the Congressional Enabling Act and the disclaimer in Section 203 of Article XVI of the North Dakota Constitution did not constitute a reservation by the United States of exclusive jurisdiction over civil causes of action between Indians residing on the reservation, if the actions did not involve Indian lands, has been criticized as faulty.

In light of the mandate of the Supreme Court in this case, our first task on remand appears to be to determine the meaning of Chapter 27-19, N.D.C.C., the Indian Civil Jurisdiction Act enacted on March 2, 1963, by our state legislature.

We are reminded that in so doing we have in the past construed state statutes:

"[T]o avoid potential state and federal constitutional problems, see, e.g., *State v. Kottenbroch*, 319 N.W.2d 465, 473 (1982); *Paluck v. Board of County Comm'rs*, 307 N.W.2d 852, 856 (1981); *Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W.2d 767, 772 (1980); *North American Coal Corp. v. Huber*, 268 N.W.2d 593, 596 (1978); *Tang v. Ping*, 209 N.W.2d 624, 628 (1973)." — U.S. at —, 104 S.Ct. at 2278, 81 L.Ed.2d at 126.

Although we normally would not attempt to construe a statute unless it were ambiguous, and an ambiguity in

Chapter 27-19 is not obvious on its face, because the United States Supreme Court is of the view that we may have been influenced in our decision as to both its meaning and its constitutionality because of our erroneous view of Public Law 280 and its amendments, we shall in this case attempt to determine the meaning of Chapter 27-19 through a study of the legislative history of that chapter.

It is interesting to note that Chapter 27-19 resulted from an interim study of the North Dakota Legislative Research Committee conducted in the interim between the 1961 and 1963 legislative sessions.

The report to the Thirty-eighth Legislative Assembly (the 1963 session of the Legislature) discloses that a subcommittee on Indian affairs was appointed pursuant to passage of Senate Concurrent Resolution "R-R" and House Concurrent Resolution "T-1" of the Thirty-seventh Legislative Assembly. A review of the report to the Thirty-eighth Legislative Assembly discloses the care in which the subcommittee acted.⁴

It is particularly interesting to note that in Part III of the report of the full legislative research committee to the Legislature, the assertion is made under part 1(i) that the assumption of civil jurisdiction by the state would provide, among other things, a tool for the accomplishment of eleven different objectives, including enforcement of contracts between Indians and non-Indians and providing a tribunal for trying tort actions.⁵

The bill prepared by the full legislative committee to accomplish the objectives as they related to civil jurisdiction was Senate Bill 30. This bill as originally introduced consisted of only six sections. The main section

was Section 1 whereby the state was to *unilaterally* accept exclusive jurisdiction over all civil causes of action which arise on Indian reservations.⁶

When the bill was first considered by the State and Federal Government Committee to which it had been referred, Representative Harold Hofstrand, the chairman of the subcommittee on Indian affairs of the Legislative Research Committee which had conducted the interim study, appeared before the Senate State and Federal Government Committee to request that a hearing be set to which should be invited the Indian tribal chairmen and the members of the Indian Affairs Commission.

When the public hearing was held, a number of Indian leaders, both within and without the State of North Dakota, appeared to oppose the passage of the bill, some asserting that civil jurisdiction should not be assumed by the state without a vote of the Indian people⁷ and, apparently, as a result thereof, the bill was amended to provide for acceptance of civil jurisdiction by the state upon acceptance by the Indian citizens as provided in Sections 2 and 5 of the bill as it finally passed the Legislature.⁸

In light of this background and the seeming intent of the Legislature to accommodate the will of the Indian people in Section 2 (§ 27-19-02 N.D.C.C.), and the will of the individual Indian in Section 5 (§ 27-19-05, N.D.C.C.), to accept state jurisdiction, even to the extent of providing for a means of the Indian people in Sections 11 and 12 and the individual Indian in Section 13 (§§ 27-19-11, -12, -13, N.D.C.C.), for withdrawing from state civil jurisdiction, and further in keeping with our policy of construing a statute to uphold its constitutionality against either state

or federal constitutional attack, we conclude that the Affiliated Tribes in this case may properly bring their action in state court providing they comply with Section 27-19-05. This will subject the property of the Tribes, as distinguished from the property of the individual Indians, to levy and execution pursuant to judgment of the state court except as such property may be exempt therefrom by appropriate state or federal law.

Further, because of what the United States Supreme Court has taught us in this case, we conclude that our language in *Nelson v. Dubois*, 232 N.W.2d 54, 57 (N.D. 1975) was too broad, and, accordingly, we disavow the following language of that case:

"We now conclude that state jurisdiction over Indian country may be obtained only by state and tribal compliance with Public Law 90-284, §§ 402 and 406. An individual defendant is no more able to confer jurisdiction upon the state than is a tribal council or a State, acting unilaterally. Section 27-19-05, N.D.C.C., enacted pursuant to Public Law 83-280, § 7 (1953), 67 Stat. 588, must now yield to the new federal doctrine." 232 N.W. 2d at 57.

As neither the act itself nor the legislative history provides for or recognizes any type of "residuary" state jurisdiction, we conclude that the act terminated any such jurisdiction if it did previously exist.

Having so construed Chapter 27-19, N.D.C.C., we must now consider whether or not, as so construed, it violates either the State or the United States Constitution. We are convinced that it does not.

Affiliated argued, prior to the construction which we have now given Chapter 27-19, that it violated Article I,

Section 9, of our State Constitution which requires that all courts be open to everyone;⁹ Article I, Section 22, of our State Constitution which requires all laws of a general nature to have a uniform operation;¹⁰ and Article IV, Section 103, which is now, after renumbering Article VI, Section 8, which provides that the district court shall have original jurisdiction of all causes.¹¹ In our view, none of these provisions are being violated.

As for Article I, Section 9, the courts are open to Affiliated providing it complies with Section 27-19-05. True, Affiliated will become subject to the court upon compliance with that section, but no more so than the defendants Wold Engineering and Schmit, Smith and Rush.

As for Article I, Section 22, that all laws of a general nature shall have a uniform operation, we have difficulty seeing how that has application to this case. This is apparently an equal protection argument which will be incidentally involved when we consider the application of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

As for Article VI, Section 8, which provides that the district court shall have original jurisdiction of all causes except as otherwise provided by law, we conclude that the contention that it has been violated by Chapter 27-19 as now construed is without merit. The district court will have original jurisdiction if Affiliated complies with Section 27-19-05.

The last issue that we must discuss is the issue of whether or not Chapter 27-19, as now construed by our Court, violates certain provisions of the United States

Constitution. Affiliated contends that Chapter 27-19 violates the due process clause and the equal protection clause of the Fourteenth Amendment.¹² All of the cases cited to us are distinguishable on the facts and none of the cases cited come even close to being comparable.

Affiliated quotes the following language from *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), for the proposition that the United States Supreme Court has declared that procedural due process is an important constitutional right that cannot be destroyed by state legislative enactment:

"But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In *Hill*, the plaintiff brought suit to enjoin the collection of property taxes, alleging that the assessment violated the equal protection clause of the Fourteenth Amendment. In previous cases, the Supreme Court of Missouri had ruled that no administrative remedy was available and that injunctive relief was appropriate for the determination of the validity of such a claim. The Missouri court overruled the earlier cases, and it denied relief because the plaintiff had failed to seek a newly found administrative remedy. The United States Supreme Court determined that the practical effect of the judgment of the Missouri court was to deprive the plaintiff of prop-

erty without affording it at any time an opportunity to be heard in its defense. "[B]y denying to it [the plaintiff] the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property." 281 U.S. at 679. The Court reversed the judgment because it had denied the plaintiff due process of law.

Affiliated argues that Chapter 27-19 operates to deprive tribal Indians, not only of procedural due process, but of access to state courts entirely.

Affiliated cites *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), for the proposition that tribal Indians' property rights, protected under the due process clause, are no more destructible than are their civil liberties, which include the right "to sue." In *Lynch*, the United States Supreme Court reversed the lower court's dismissal of the appellant's complaint which alleged that a Connecticut law authorizing summary pre-judicial garnishment was invalid under the equal protection and due process clauses of the Fourteenth Amendment, and which sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3). The lower court had dismissed the complaint, in part, on the ground that it lacked jurisdiction under § 1343(3), because that section applied only if "personal" rights, as opposed to "property" rights, were allegedly impaired. The Court rejected that distinction in concluding that §§ 1983 and 1343(3) provide a federal judicial forum for the redress of wrongful deprivations of *property* by persons acting under color of state law.

Affiliated argues, based upon the broad legal propositions it has gleaned from *Hill*, and *Lynch*, "that strict constitutional scrutiny of Chapter 27-19 is justified because it clearly burdens Indians' rights that are protected by the Fourteenth Amendment," citing *Logan v. Zimmerman*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). We assume that what Affiliated refers us to by its citation to *Logan*, is the two-part due process inquiry articulated therein: "[W]e must determine whether Logan was deprived of a protected interest, and, if so, what process was his due," *id.*, and the Court's reference in that case to the holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), that a cause of action is a species of property protected by the due process clause.

In our view, Affiliated has not been *deprived* of a protected interest or denied access to state courts because of legislative or judicial action by the state, but rather, to the contrary, jurisdiction has been offered by the state over all civil causes of action which arise on an Indian reservation upon acceptance by Indian people as provided by law. The *Indian people* have deprived themselves of access to state courts because they have not accepted state jurisdiction in the manner provided for in Chapter 27-19, N.D.C.C. The *tribes* will deprive themselves of access to the state courts in the future if they do not avail themselves of the opportunity provided for acceptance of state jurisdiction through our construction of Section 27-19-05, N.D.C.C., today.

Affiliated also asserts that Chapter 27-19 represents constitutionally suspect class-based legislation that singles

out a discrete, insular minority for disadvantaged legislative treatment.

The case most closely related to this case, referred to by Mr. Justice Rehnquist in his dissent in this case, *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), authored by Mr. Justice Stewart, appears to hold to the contrary. In *Washington v. Confederated Bands and Tribes*, the Court rejected a similar challenge to a Washington statute, Ch. 36, 1963 Wash. Laws, which obligated the state to assume civil and criminal jurisdiction over Indians and Indian territory within the state, subject only to the condition that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands without the request of the Indian tribe affected. In holding that this "checkerboard" pattern of jurisdiction applicable on the reservations of non-consenting tribes was not on its face invalid under the equal protection clause of the Fourteenth Amendment, the United States Supreme Court said:

"First, it [the Tribe] argues that the classifications implicit in Chapter 36 are racial classifications, 'suspect' under the test enunciated in *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, and that they cannot stand unless justified by a compelling state interest. Second, it argues that its interest in self-government is a fundamental right, and that Chapter 36—as a law abridging this right—is presumptively invalid. Finally, the Tribe argues that Chapter 36 is invalid even if reviewed under the more traditional equal protection criteria articulated in such cases as *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520.

"We agree with the Court of Appeals to the extent that its opinion rejects the first two of these

arguments and reflects a judgment that Chapter 36 must be sustained against an Equal Protection Clause attack if the classifications it employs 'rationally further the purpose identified by the State.' *Massachusetts Bd. of Retirement v. Murgia*, *supra*, at 314, 96 S.Ct., at 2567. It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535, 551-552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub. L. 280. And many of the classifications made by Chapter 36 are also made by Pub. L. 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, *see, e.g., United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power." [Footnotes omitted.]

Chapter 27-19 does not constitute a restriction against Indian people or individual Indians accepting the jurisdiction of the state judicial system, rather it is a limita-

tion of the state judicial system preventing it from imposing jurisdiction upon the Indian people or individual Indians against their will and without their consent. The statute does not treat them less than equal, it treats them more than equal. In light of the fact that they have demanded this unique treatment, they cannot reasonably complain of it, especially when they have within themselves the power to be free from this protective web if they so desire. Not only do they have the authority to accept jurisdiction, but they have the authority after acceptance to terminate it.¹¹ It would be difficult to contemplate a statute which was fair to all that could protect the Indian more and restrict the Indian less than Chapter 27-19.

Accordingly, we vacate the opinion initially rendered by our Court on July 1, 1982, substitute this opinion therefor, and remand this case to the district court with instructions to proceed consistent herewith.

In so holding, we suspect that neither side of this controversy will be completely satisfied. This causes us to assert that, aside from the very narrow issue of residuary jurisdiction involved in this case, the Indian people will not receive justice on a par with other citizens of this state until they realize that their rights are best preserved in the state courts and they vote to accept state jurisdiction in all civil cases; or until the Congress of the United States so realizes and as a consequence requires acceptance of state jurisdiction by the Indian tribes and the Indian people; or until the Congress of the United States creates a federal court with jurisdiction to decide civil cases arising within the exterior boundaries of Indian reservations. Indians are now full citizens of this state,

they have the franchise and they could receive the fruits of justice in our state courts if they would but accept jurisdiction for all civil purposes, submit their problems to those courts, and have faith in the judicial system which all other citizens, irrespective of their ancestry, must and do rely upon.

In view of the realization that over 20 years have elapsed since the Legislature conducted its study into Indian problems, the unfulfilled great hope of the Legislature in the improvement of Indian and non-Indian relations which would result from the ultimate assumption by the state or acceptance by the Indian people of civil jurisdiction, and the existence of a multitude of problems arising from the lack of uniform jurisdiction, we believe it to be appropriate and timely for the Legislature to again create an interim Indian jurisdiction study committee, which would include representatives of the Indian people, which study hopefully might be conducted contemporaneously with a national study by Congress with the object of finding a solution to these complex and emotional problems. It is quite obvious that a court such as ours cannot resolve the problems in a piece-meal, case-by-case basis. Ultimately, most issues in this area are brought to this Court with very disappointing results because we are required to say in most cases that our state courts do not have jurisdiction to decide the issues that cry out for an answer.

Notwithstanding what we have just said in the two preceding paragraphs, we emphasize that we are relying in this case wholly on independent and adequate state grounds. Those grounds are that Chapter 27-19, N.D.C.C.,

requires and permits the disposition we have made in this case and that our disposition does not offend the state constitution.

/s/ Ralph J. Erickstad

/s/ Gerald W. VandeWalle

/s/ H. F. Girke III

/s/ Vernon R. Pederson S.S.

Surrogate Judge Pederson participated in this case by assignment pursuant to § 27-17-033, N.D.C.C.

Justice Paul M. Sand, who died on December 8, 1984, was a member of this Court at the time this case was submitted.

¹ "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Enabling Act of Feb. 22, 1889, § 4, cl. 2, 25 Stat. 676.

² "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;" N.D. Const. art. XVI, § 203 (1889).

³ "Assumption by State of Civil Jurisdiction

"Sec. 402. (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State." Pub.L. 90-284, § 402(a), 82 Stat. 79, codified at 25 U.S.C. § 1322(a).

⁴ "Although such has been said about reservation problems at numerous conferences and meetings, and even on the floors of the Legislative Assembly, the Committee decided to begin its work by obtaining thorough, first-hand information about Indian law enforcement, education, health, and welfare problems directly from the Indian citizens themselves.

"A series of hearings was therefore held on all reservations in all Indian counties in the State. The hearings and meetings followed the pattern of meeting at the county seat with representatives of the counties and cities, law enforcement officials, juvenile commissioners, and interested citizens

—plus such Indian citizens from the areas as might choose to attend. The Committee would then shift its hearing to a location on the reservation that would be more convenient for the attendance of Indian citizens, and all residents of the reservation as well as representatives of the Bureau of Indian Affairs were invited to attend. Such meetings and hearings were held at the cities of Rolla and Dunseith in Rolette County and at Belcourt on the Turtle Mountain Indian Reservation; at Parshall and New Town in Mountrail County; at Halliday and at the Twin Butte School in Dunn County for the Fort Berthold Reservation; at Fort Yates in Sioux County for the Standing Rock Reservation; at Minnewaukan in Benson County and at Fort Totten for the Fort Totten Reservation.

"All of these hearings were well attended and in every instance residents of the reservations, local officials, and interested citizens spoke freely and frankly. At several of the hearings the interest was so high that it was necessary for the hearings to be continued for several hours past their scheduled time for adjournment.

"The Committee recognized from the beginning that the responsibility for government on the reservations and the provision of governmental services is in fact a partnership affair. While the historic and legal responsibility for most of the normal services of government rests with the United States, by treaty and by congressional act, the Federal Government has delegated substantial authority to tribal governments, and over the years the State of North Dakota and its political subdivisions have provided substantial governmental services, especially in the field of welfare. In view of the divided responsibility for reservation government and governmental services, it was obvious to the Committee that State action alone could not affect all areas in which serious problems exist. In addition, there is much confusion as to which level of government has the responsibility for certain functions or services, or even which level of government might have jurisdiction to offer services.

"Following a number of Committee meetings and the series of hearings described earlier in this report, the Committee decided that its report and recommendations should not be limited to only those areas in which the State might have authority to take action, but should view the matter as a whole, delineate the problems, and suggest the areas in which the Federal, tribal, or State governments should be active, and recommend specific action by each level of government." Report of the North Dakota Legislative Research Committee, Thirty-eighth Legislative Assembly, Indian Affairs 1963, at 31.

5 "1. The assumption of civil jurisdiction by the State would provide, among other things, a tool for:

1. Determining the parentage of children;
2. Enforcing support by the head of the household for the wife, children, or dependents;
3. Placement of children in foster homes, both on and off the reservations;
4. Termination of parental rights and provisions for adoption of Indian children;
5. Providing institutional custody and rehabilitation services for juvenile delinquents in some instances;
6. Handling divorces and other matters affecting mixed marriages;
7. Involuntary commitment of mentally ill Indians to mental institutions;
8. Enforcement of contracts between Indians and non-Indians;
9. Providing a tribunal for trying tort actions (wrongful injuries to persons or property);
10. Permitting the service of civil process upon reservations by State authorities;
11. Providing a tribunal for the settlement or trial determination of many types of actions too numerous to mention." Report of the North Dakota Legislative Research Committee, Thirty-eighth Legislative Assembly, at 36.

6 "SECTION 1.) In accordance with the provisions of Public Law 280 of the 83rd Congress and Section 203 of the North Dakota Constitution, the state of North Dakota hereby accepts and shall have exclusive jurisdiction over all civil causes of action which arise on Indian reservations or in Indian country to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such Indian reservations or Indian country as they have elsewhere within this state." Senate Bill 30, Thirty-eighth Legislative Assembly.

7 "Marvin Sonosky, 1700 K St., Washington, D.C., representing Standing Rock Indian reservation, spoke against passage of the bill. He said there were only four Indians on the Indian Commission and that wasn't enough. He believed it was only local merchants concerned about collecting debts. President Eisenhower signed a bill from another state but said it was unchristian. He believes the only reason the state didn't want criminal jurisdiction was because it would cost too much money but civil jurisdiction was easier to do. He asked that the legislature give the Indians time to vote whether they want this civil jurisdiction but added they don't want it. Standing Rock is partly in North Dakota and partly in South Dakota so this would put only part of the reservation in civil jurisdiction which would create problems. Mr. Sonosky gave an example of Petitions filed in 7th district circuit court in South Dakota of Julia Hankins which was appealed. He stated that Standing Rock is eligible for a million and a half dollar housing project this year. But if they are under civil jurisdiction, they are not eligible.

. . .

"Theodore Jamerson, past tribal chairman and a present employee on Standing Rock Reservation, introduced several men with him from the reservation. He took a definite stand against S.B. No. 30. He feels they have a good setup for their Indian people. We only hear about the bad ones and not the good ones. He stated that Standing Rock Indian reservation courts are far superior to County Courts and also the police department. They are interested in the textile plant at McLaughlin, South Dakota and the cheese plant at Selfridge. He went on to say that the reservation operates their program according to the individual's ability and not all on the same level. They are trying to raise economic standards of living so they can get away from Welfare. He left several reports with the Committee.

. . .

"Carl Whitman, tribal chairman, Ft. Totten reservation said the general feeling of the reservation is against civil jurisdiction and he is convinced our Indians aren't ready for civil jurisdiction. His Indians are still adjusting to displacing of their homes for the Garrison Dam. He feels state should wait until the Indian asks for civil jurisdiction." Minutes of the Senate State and Federal Government Committee Meeting, January 15, 1963.

⁸ "§ 2.) Acceptance of jurisdiction may be by either of the following methods:

1. Upon petition of a majority of the enrolled residents of a reservation who are twenty-one years of age or older; or
2. The affirmative vote of the majority of the enrolled residents voting who are twenty-one years of age or older, at an election called and supervised by the North Dakota Indian affairs commission upon petition of fifteen percent of those eligible to vote at such an election.

. . .

"§ 5.) An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein." N.D. Sess. Laws, Ch. 242, §§ 2, 5 (1963).

⁹ "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." N.D. Const. art. I, § 9.

¹⁰ "All laws of a general nature shall have a uniform operation." N.D. Const. art. I, § 22.

¹¹ "The district court shall have original jurisdiction of all causes, except as otherwise provided by law, and such appellate jurisdiction as may be provided by law or by rule of the supreme court. The district court shall have authority to issue such writs as are necessary to the proper exercise of its jurisdiction." N.D. Const. art. VI, § 8.

¹² "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

¹³ "Civil jurisdiction as herein provided over an Indian reservation may be terminated by petition of three-fourths of the enrolled residents of a reservation who are eighteen years of age or older. Such petition shall be filed with the North Dakota Indian affairs commission." § 27-19-11, N.D.C.C.

"Upon the filing of a petition for withdrawal from the civil jurisdiction of the state, the executive director of the North Dakota Indian affairs commission after substantiating that the provisions of section 27-19-11 have been complied with shall certify such withdrawal to the governor. Upon such certification the governor shall, within ten days, issue a proclamation proclaiming that thirty days from the date of the issuance of such proclamation the civil jurisdiction of the state shall be terminated except as to those causes of action which arose prior to the effective date of such termination or to those contractual obligations which were incurred prior to the effective date of such termination of state civil jurisdiction." § 27-19-12, N.D.C.C.

"An individual who has accepted state civil jurisdiction under the provisions of section 27-19-05 may withdraw upon filing with the county auditor a statement declaring his withdrawal. Such withdrawal shall not affect causes of action which arose prior to such withdrawal or contractual obligations which were incurred prior to such withdrawal." § 27-19-13, N.D.C.C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal;

U.S. CONST. AMEND. XIV

Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 402(a) OF PUBLIC LAW 90-284

82 STAT. 79, CODIFIED AT 25 U.S.C. § 1322 (1983)

§ 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes

of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

SECTION 404 OF PUBLIC LAW 90-284,

82 STAT. 79, CODIFIED AT 25 U.S.C. § 1324

§ 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title (25 USCS §§ 1321 et seq.). The provisions of this title (25 USCS §§ 1321 et seq.) shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

SECTION 406 OF PUBLIC LAW 90-284,

82 STAT. 79, CODIFIED AT 25 U.S.C. § 1326 (1983)

§ 1326. Special election

State jurisdiction acquired pursuant to this title (25 USCS §§ 1321 et seq.) with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled In-

dians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 percentum of such enrolled adults.

SECTION 16, 16 STAT. 144,
CODIFIED AT 42 U.S.C. § 1981 (1981)

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SECTION 1 OF PUBLIC LAW 96-170,
93 STAT. 1284, CODIFIED AT 42 U.S.C. § 1983 (1981)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

State:

N.D. CONST. ART I.

Section 9. All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

INDIAN CIVIL JURISDICTION ACT

CHAPTER 27-19 OF
N.D. CENTURY CODE (1974)

27-19-01. Assumption of jurisdiction.—In accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general ap-

plication to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.

27-19-02. Method of acceptance.—Acceptance of Jurisdiction may be by either of the following methods:

- (1) Upon petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older; or
- (2) The affirmative vote of the majority of the enrolled residents voting who are eighteen years of age or older, at an election called and supervised by the North Dakota Indian Affairs Commission.

27-19-03. Acceptance proclamation.—Upon acceptance of civil jurisdiction by either method provided in section 27-19-02 the executive director of the Indian affairs commission shall certify such acceptance to the governor. Upon such certification the governor shall, within ten days, issue a proclamation proclaiming that thirty days from the date of the issuance of such proclamation the provisions of this chapter shall be in effect.

27-19-04. Effective date.—The provisions of this chapter shall affect only those causes of action which arise after the effective date of state jurisdiction as provided in section 27-19-03.

27-19-05. Individual acceptance.—An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction

shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein.

27-19-06. Acceptance by guardian.—A guardian appointed by the tribal court or court of Indian offenses may consent to state civil jurisdiction for his ward provided he is authorized to do so by the tribal court or court of Indian offenses.

27-19-07. Contempt powers.—In addition to other authority conferred by this chapter, the courts of this state shall have the power to hold persons in civil or criminal contempt of court in order to maintain the dignity of the courts and enforce their orders.

27-19-08. Limitations upon jurisdiction.—Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. The civil jurisdiction herein accepted and assumed shall include but shall not be limited to the determination of parentage of children, termination of par-

ental rights, commitments by county mental health boards or county judges, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents.

27-19-09. Tribal ordinances and customs preserved.—Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community, in the exercise of any authority which it may possess shall, if not inconsistent with the applicable civil law of this state, be given full force and effect in the determination of civil causes of action pursuant to this section.

27-19-10. Other benefits not affected.—The provisions of this chapter shall not be construed as requiring the extension of any health, welfare, educational or other governmental service to Indian reservations or Indian country, not otherwise required by the laws or constitution of this state.

27-19-11. Petition for withdrawal.—Civil jurisdiction as herein provided over an Indian reservation may be terminated by petition of three-fourths of the enrolled residents of a reservation who are eighteen years of age or older. Such petition shall be filed with the North Dakota Indian affairs commission.

27-19-12. Withdrawal proclamation.—Upon the filing of a petition for withdrawal from the civil jurisdiction of the state, the executive director of the North Dakota Indian affairs commission after substantiating that the provisions of section 27-19-11 have been complied with shall certify such withdrawal to the governor. Upon such certification the governor shall, within ten days, issue a pro-

clamation proclaiming that thirty days from the date of the issuance of such proclamation the civil jurisdiction of the state shall be terminated except as to those causes of action which arose prior to the effective date of such termination or to those contractual obligations which were incurred prior to the effective date of such termination of state civil jurisdiction.

27-19-13. Individual withdrawal.—An individual who has accepted state civil jurisdiction under the provisions of section 27-19-05 may withdraw upon filing with the county auditor a statement declaring his withdrawal. Such withdrawal shall not affect causes of action which arose prior to such withdrawal or contractual obligations which were incurred prior to such withdrawal.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Three Affiliated Tribes of the Fort Berthold
Reservation,

Plaintiff and Appellant,

v.

Wold Engineering, P.C., a North Dakota Pro-
fessional Corporation,

Defendant, Third-Party
Plaintiff, and Appellee,

v.

Schmit, Smith & Rush,

Third-Party Defendant.

Civil No. 10,172

ON REMAND FROM
THE UNITED STATES SUPREME COURT
PETITION OF APPELLANT, THREE AFFILIATED
TRIBES, FOR REHEARING

Appellant, Three Affiliated Tribes, respectfully prays
this Court to grant its Petition for Rehearing in this mat-
ter pursuant to Rule 40 of the North Dakota Rules of
Appellate Procedure for the reasons set forth below.

I.

Introduction

The very kernal of this case is whether anything in
state law bars the adjudication in state court of the Three

Affiliated Tribes' damages action against a non-Indian
engineering firm. *Three Affiliated Tribes v. Wold Engi-
neering*, 104 S.Ct. 2267, 2276-2277 (1984). This Court, in
responding to the United States Supreme Court's mandate
in this matter, decided in its Opinion of March 13, 1985,
that the state legislature's enactment of Chapter 27-19-05
of the N.D.C.C. in 1963 terminated any preexisting state
judicial jurisdiction over claims by tribal Indians against
non-Indians if those claims arose on an Indian reserva-
tion within North Dakota. However, this Court also held
that, by virtue of tribal consent to state civil jurisdiction
pursuant to the terms of Section 27-19-05 of the N.D.C.C.,
state courts may acquire the subject-matter jurisdiction
necessary to adjudicate tribal claims against non-Indians
in state courts.

This Court, in reaching that result, disavowed its
prior holding in *Nelson v. Dubois*, 232 N.W.2d 54, 57 (N.D.
1975, that Section 27-19-05 had been preempted by the
substantial Congressional amendment and reenactment,
through Pub.L. 90-284, of Pub.L. 280 in 1968. Neither party
in this matter had the opportunity to brief and argue the
unanticipated and unforeseen issue of whether tribal con-
sent to state civil jurisdiction was possible, given the pre-
vailing state of North Dakota law, under the terms of
Section 27-19-05. Reargument by the parties of this mat-
ter, as to the two limited issues set forth below, would
clarify this Court's holding as to the ramifications of such
tribal consent and would provide a guide to both the pres-
ent parties and to future litigants as to their conduct:

1) Whether such tribal consent under Section 27-19-
05 would be effective to confer judicial jurisdiction over

these categories of actions in light of *Kennerly v. District Court*, 400 U.S. 423 (1971). (Justice Blackmun, speaking for the majority of the Supreme Court in its decision on this matter, affirmed the Court's position that any *new assumption* of state jurisdiction, post 1968, must comply exclusively with the federal law set forth at 25 U.S.C. §§ 1301, 1322, 1324, 1326. See, *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct., ftn. 11 at 2276.)

2) Whether the scope of such tribal consent under Section 27-19-05, if such consent is effective to confer judicial jurisdiction over these categories of actions on the state courts, empowers the state courts to levy or execute on tribal property pursuant to their judgments consistent with Section 27-19-08 of the N.D.C.C., and governing federal law, constraining the exercise of such judicial jurisdiction.

II.

Argument

Tribal Consent Pursuant to Section 27-19-05 Will Not Confer on North Dakota Courts Authority to Adjudicate the Tribe's Claims against Wold Engineering.

This Court has decided that the enactment of Chapter 27-19 by the state legislature in 1963 effectively terminated any state judicial jurisdiction that may have existed over tribal claims against non-Indians before the date of that enactment. (*Opinion*, at p. 8) Therefore, as a matter of federal law, the acquisition of state civil jurisdiction now over such tribal claims can only be obtained by state and tribal compliance exclusively with federal law, not state law, as declared by the amended

and reenacted form of Pub.L. 280, set forth in Pub.L. 90-284. See, *Kennerly v. District Court*, *supra*. Justice Blackmun, speaking for the majority of the Supreme Court in its decision in this matter, confirmed that the exclusive method for the acquisition of new state civil jurisdiction—as future tribal compliance with Chapter 27-19-05 would purport to confer on North Dakota courts—is by compliance with the procedural and substantive requirements of Pub.L. 90-284, the amended and reenacted form of Pub.L. 280. *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct., ftn. 11 at 2276. See also, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 494 (1979) (The Congressional repeal in 1968 of Section 7 of Pub.L. 280 means that states such as North Dakota, can no longer acquire civil jurisdiction in Indian country except by compliance with the terms of governing federal law as represented by Pub.L. 90-284.)

Therefore, based on the foregoing, the Three Affiliated Tribes submit that tribal compliance with Section 27-19-05 would be ineffective, as a matter of controlling federal law in Indian affairs, to confer the civil jurisdiction necessary to hear this category of actions on state courts.

III.

Argument

Section 27-19-08 is an Affirmative State Legislative Constraint Barring The State Court Levy, or Execution, on Tribal Property

State courts cannot levy or execute on tribal property to satisfy a court judgment consistent with Section 27-19-08 of the N.D.C.C. The federal law governing In-

dian affairs likewise prohibits state courts from levying or executing on tribal trust property even if that state is acting pursuant to judicial authority granted to it under Pub.L. 280. The United States Supreme Court, Justice Brennan writing for the majority, said in the leading case on the matter, that:

. . . the express prohibition of any 'alienation, encumbrance, or taxation' of any trust property can be read as prohibiting state courts, *acquiring jurisdiction over civil controversies involving reservation Indians pursuant to § 4 from applying state laws or enforcing judgments in ways that would effectively result in the 'alienation, encumbrance, or taxation' of trust property.* (emphasis added) *Bryan v. Itasca County*, 425 U.S. 373, 391 (1976).

Re argument of this matter would allow this Court to reconsider its specific holding that tribal compliance with Section 27-19-05 would subject the property of the Three Affiliated Tribes to possible levy and execution on its property pursuant to judgment of the state court. (*Opinion*, at p. 7)

IV.

Conclusion

The Three Affiliated Tribes submit that the rehearing and reargument of this matter, consistent with this Petition, would serve to clarify the important judicial rights of both tribal and non-tribal litigants in future cases arising on Indian reservations within the state of North Dakota.

This Court should consider the counsel of Justice Frankfurter regarding the propriety of granting the Petition for Rehearing:

Because I deem a reargument to be required, I do not mean to imply that it would lead to a different result. *The basis of an adjudication may be as important as the decision. The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process.* (emphasis added) *Detroit v. Murray Corp.*, 357 U.S. 913, 915. (Justice Frankfurter writing in dissent to the denial of the petition for rehearing in the matter.)

This Petition for Rehearing should be granted and the case set for reargument on the regular calendar.

Respectfully submitted,

John O. Holm
Attorney for Appellant
17 Second Avenue West
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CERTIFICATE OF SERVICE

The undersigned, counsel for Appellant, Three Affiliated Tribes, hereby certifies that he caused to be mailed to the following attorneys for parties to Civil No. 10,172, in the Supreme Court of the State of North Dakota on Remand from the United States Supreme Court, a true copy of Petitioner's Petition for Rehearing, via first class United States mail, on this.....day of....., 1985

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PETITIONER'S BRIEF

(4)
No. 84-1973

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH B. SPANGL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

— o —
THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,
v.

WOLD ENGINEERING, P.C., and
SCHMIDT, SMITH & RUSH,
Respondents.

— o —
On Certiorari to the Supreme Court of North Dakota

— o —
PETITIONER'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state may enact a statute, consistent with the equal protection and due process clauses of the Fourteenth Amendment, barring tribal plaintiffs from access to state court in circumstances where non-Indian plaintiffs may clearly maintain such actions.
2. Whether Congress' enactment of Public Law 90-284, has preempted any authority North Dakota may have had to condition tribal Indians' access to state court, in these circumstances, on a tribal transfer, or cession, to the state of civil jurisdiction over their members or reserved lands.
3. Whether a state may require, consistent with federal Indian policy and decisional law, an Indian tribe to waive its immunity from state civil jurisdiction, for all cases, as a condition for bringing a damages action against a non-Indian engineering firm in state court.

PARTIES TO THE ACTION

The parties to this proceeding are the Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner; Wold Engineering, P.C., a North Dakota professional corporation, Respondent; and Schmidt, Smith & Rush, Respondents.

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Argument:	
I. The exclusion of tribal plaintiffs from access to state court. In circumstances where non-Indian plaintiffs may clearly maintain such actions, violates the due process and equal protection clauses of the Fourteenth Amendment.	12
A. Tribal Indians residing on reservation within North Dakota, prior to the enactment of Chapter 27-19, were guaranteed access to state court forums, by virtue of the "open courts" provision of the state constitution, for the enforcement of their damages claims against non-Indians even if those claims arose on reservations within the state.	12
B. Chapter 27-19, as construed and applied by the court below, constitutes a selective withdrawal, or termination, of state judicial protection of tribal Indians' damages claims against non-Indians.	15
C. Chapter 27-19 is subject on judicial review to strict, or heightened, judicial scrutiny.	17

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A. Congress' enactment of Public Law 90-284 has preempted any authority North Dakota may have had to condition tribal Indians' access to state court on a tribal transfer, or cession, to the state of civil jurisdiction over their members or reserved lands.	27
B. Chapter 27-19, has the potential for the significant economic or governmental disruption of the tribal governments and is therefore preempted by governing federal law and policy in Indian affairs.	31
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SECONDARY SOURCES:	
Burnette, <i>An Historical Analysis of the 1968 Indian Civil Rights Act</i> , 9 Harv. J. on Legis. 557 (1972)	29, 30
Cohen, <i>Handbook of Federal Indian Law</i> (University of New Mexico Press, 1971 Reprint)	21
Karst, <i>Equal Citizenship Under the Fourteenth Amendment</i> , 91 Harv. L. Rev. 1 (1977)	20
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No. 84-1973

In The
Supreme Court of the United States
October Term, 1985

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,
v.

WOLD ENGINEERING, P.C., and
SCHMIDT, SMITH & RUSH,
Respondents.

On Certiorari to the Supreme Court of North Dakota

PETITIONER'S BRIEF

OPINIONS BELOW

The judgment of dismissal of petitioner's damages action against Wold Engineering by Judge Berning of the Northwest Judicial District for North Dakota, Civil No. 46392, is an unreported decision (J.A. 18-20). The judgment of the North Dakota Supreme Court affirming the state district court's dismissal of petitioner's action is reported at 321 N.W. 2d 510 (1982). The opinion of this Court, vacating the decision of the North Dakota Supreme Court and remanding the case for further proceedings, is reported at 104 S. Ct. 2267. The opinion of the North Dakota Supreme Court, vacating its previous opinion of July 1, 1982, and modifying the district court's judgment, is reported at 364 N.W. 2d 98 (1985) (J.A. 21-43).

JURISDICTION OF THIS COURT

Jurisdiction of this Court to review the North Dakota Supreme Court's decision in this matter is conferred by 28 U.S.C. sec. 1257(3). The opinion of the state court was filed on March 13, 1985 (J.A. 21-43). A petition for rehearing was denied on April 1, 1985 (J.A. 52-57). The Tribe's Petition for Certiorari was filed with this Court on June 20, 1985. This Court granted that petition on October 15, 1985. 54 *U.S.L.W.* 3252.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in the Joint Appendix (J.A. 44-51).

Federal: U.S. Const., amend XIV, Sec. 1; Sections 402(a), 404 and 406 of Public Law 90-284, 82 Stat. 629, now codified at 25 U.S.C. Secs. 1322, 1324 and 1326 (1983); Section 16 of R.S. Sec. 1766, 16 Stat. 144, now codified at 42 U.S.C. Sec. 1982; and Section 1 of R.S. Sec. 1979, 17 Stat. 13, *as amended* by Public Law 96-170, 93 Stat. 1284, now codified at 42 U.S.C. Sec. 1983 (1981).

State: *N.D. Const.*, Art. I, Sec. 9; *N.D. Cent. Code*, Chapter 27-19, "Indian Civil Jurisdiction Act."

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STATEMENT OF THE CASE

In 1963, the North Dakota legislature enacted a special statutory jurisdictional requirement, applicable to Indians only, as Chapter 27-19 of the North Dakota Century Code and entitled the Indian Civil Jurisdiction

Act. That statute has been read by the court below as requiring tribal governments to waive their immunity from state court civil jurisdiction for all cases as a condition for bringing an on-reservation damages action against a non-Indian engineering firm in state court. The state court also read that statute as barring all tribal plaintiffs from state court in these circumstances until they comply with Chapter 27-19. 364 N.W. 2d 93 (1985) (J.A. 21-43).

I

Prior History Of This Case Before This Court

This case concerns an action for damages brought in state district court by the Three Affiliated Tribes, a federally-recognized Indian tribe, against a non-Indian engineering firm. This case arose on the Fort Berthold Reservation in North Dakota. That reservation had been set aside for the use and occupancy of the Mandan, Hidatsa and Arikara Tribes by the Act of March 3, 1891, 26 Stat. 1032. *See City of New Town v. United States*, 454 F. 2d 121 (8th Cir. 1972).

The Three Tribes contracted in 1974 with respondent, Wold Engineering Company (hereinafter "Wold"). Wold is a professional corporation organized under the laws of North Dakota and has its principal office off-reservation in Bottineau, North Dakota. Wold was employed by petitioner to design a public works project on the Fort Berthold Indian Reservation. The purpose of this project, known as the Four Bears Water System Project, was to provide a continuous, safe and secure domestic water supply source to serve the needs of a portion of the reservation populace. This was to be accomplished by diverting water from Lake Sakakawea through an intake structure and pump system.

Respondent undertook the project and had installed a submersible pump, built to its design specifications, on a pier of the Four Bears Bridge that crossed the lake. That system was completed on July 29, 1977. However, that system was subject to continual failure and despite several attempts at correction by respondent, the system has never delivered a continuous supply of water as was contemplated by the project's purpose.

Petitioner (hereinafter "Tribe") commenced a negligence and breach of contract action against Wold on March 20, 1980 in state court (J.A. 1-3). Wold moved to dismiss this action at trial on the grounds that the state court lacked subject matter jurisdiction, as a matter of federal law, over the case since it arose on an Indian reservation. Wold's motion was granted by the trial judge on January 11, 1982. (J.A. 18-20). On February 23, 1982, petitioner filed its Notice of Appeal to the Supreme Court of North Dakota (See, Orig. Pet. for Cert. at 2).

The North Dakota Supreme Court on July 1, 1982, relying on the Tribe's lack of consent under Chapter 27-19 and the state legislature's authority under Public Law 280 to adopt such a jurisdictional statute, affirmed the state district court's dismissal for want of subject matter jurisdiction of the Tribe's action for damages against the non-Indian engineering firm. 321 N.W. 2d 510 (1982) (See, Orig. Pet. for Cert. at 3).

This Court granted the Three Affiliated Tribes' Petition for Certiorari. 103 S. Ct. 1872 (1983). The Court decided that the state court's decision in this matter should be vacated and the case remanded to the lower court for further proceedings not inconsistent with this Court's opinion. 104 S. Ct. 2267 (1984), *vacating and remanding*, 321 N.W. 2d 510 (1982).

Justice Blackman, writing for the majority of this Court, considered that disposition especially appropriate

in light of the state court's earlier decision establishing the right of tribal Indians to access to North Dakota courts and the existence of state subject matter jurisdiction over tribal plaintiffs' claims against non-Indians arising on reservations as a matter of state law. 104 S. Ct. at 2275. The state court, on remand, was to assess the jurisdictional effect of Chapter 27-19 knowing that, in the light of the Court's opinion:

(1) Chapter 27-19 did not represent either a federally-authorized state legislative disclaimer or bar of state court jurisdiction under Public Law 280 over tribal plaintiff's damages claims, arising on reservation, against non-Indian defendants; and

(2) Chapter 27-19 was not insulated by operation of federal law from state and federal constitutional scrutiny. 104 S. Ct. at 2277.

II

History Of This Case On Remand To The North Dakota Supreme Court Summary of Argument

The North Dakota Supreme Court, on March 13, 1985, decided that Chapter 27-19, as a matter of state law alone, barred tribal plaintiffs from state courts until they consented to state civil jurisdiction over their person and property on reservation and waived their immunity to general civil liability in state court under the terms of that statute. 364 N.W.2d 98 (1985) (J.A. 21-43).

Chapter 27-19 was construed by the state court as having terminated any pre-existing right to sue non-Indians in state courts that tribal plaintiffs may have claimed under the jurisdictional principles declared in *Vermillion v. Spotted Elk*, 85 N.W. 2d 342 (N.D. 1957). Tribal Indian plaintiffs, the court decided, will have access to state courts in reservation-based damages actions against non-

Indians only upon compliance with the terms of Chapter 27-19. Sec. 27-19-02 (J.A. 28). However, the court also held that individual tribal Indians, including tribal governments, may have access to state courts to sue non-Indians in these circumstances if they comply with Section 27-19-05 of the statute (J.A. 28-29). The Tribe's consent to state civil jurisdiction, filed with the county auditor where the Indian resides, would subject it to general civil liability in state court for all cases. Sec. 27-19-13, N.D.C.C. (J.A. 31).

Further, such consent will subject the tribal Indian to state jurisdiction in the following categories, but shall not be limited to them: (1) determination of parentage of children; (2) termination of parental rights; (3) commitments by county mental health boards or county judges; (4) guardianship; (5) marriage contracts; and (6) obligations for the support of spouse, children or other dependents. Sec. 27-19-08, N.D.C.C. (J.A. 29-30).

The state court, characterizing Chapter 27-19 as protective and benign state legislation that favors tribal Indians residing on federal reservations in the state, upheld the statute against the Tribe's federal statutory and constitutional challenges as to its validity (J.A. 32-35). The state court also upheld the constitutionality of Chapter 27-19, although the statute excludes thousands of tribal plaintiffs, admittedly citizens and residents of North Dakota, from state courts in these circumstances (J.A. 36-37). The state court, stating that it was relying entirely on Chapter 27-19 as an adequate and independent state ground for its decision, decided that the statute both required, and permitted, the dismissal of tribal plaintiffs' damages actions against non-Indians in these circumstances (J.A. 36-37).

The state court, in light of its decision allowing individual compliance with Chapter 27-19, vacated its earlier

opinion in this matter, modified the district court's judgment and remanded the case for further proceedings. The Three Affiliated Tribes filed its Petition for Rehearing in this matter on March 27, 1985 (J.A. 52-57). The state court denied that petition on April 1, 1985. The state court has entered two orders, on March 21, and April 1, 1985, respectively, modifying page 7 of its opinion in this matter. Petitioner filed its Motion to Stay the Entry of Mandate by the State Court for the purpose of seeking judicial review by this Court on April 22, 1985. The state court granted that motion on April 22, 1985.

The Tribe filed its Petition for Writ of Certiorari on June 20, 1985. This Court granted that petition on October 15, 1985. 54 U.S.L.W. 3252.

SUMMARY OF ARGUMENT

I

The court below erred in holding that the state legislature may enact, consistent with the due process and equal protection clauses of the Fourteenth Amendment, a statute, Chapter 27-19, N.D.C.C., that bars tribal Indians from access to state courts in circumstances where non-Indian plaintiffs may clearly maintain such actions.

Tribal Indians before the enactment of Chapter 27-19, in 1963, were entitled, by virtue of the "open courts" provision of the state constitution and judicial precedent, to access to state court forums for the enforcement of their damages claims against non-Indians even if those claims

arose on reservations within the state. *N.D.Const., Art I* sec. 9 (the state courts are open to all men to provide a remedy for any injury that they may suffer to their person or property). See *Vermillion v. Spotted Elk*, 85 N.W.2d 342 (N.D. 1957).

However, the Court below held that the enactment of Chapter 27-19 effected a legislative overruling of the *Vermillion* decision. That statute's enactment, therefore, according to the court below, terminated any state judicial protection that tribal Indians may have previously claimed in these circumstances. Subsequent to the enactment of Chapter 27-19, tribal Indians are barred from access to state court forums in these circumstances unless they comply strictly with the requirements of Chapter 27-19. Tribal Indians are now rendered vulnerable, by the decision below, to substantial wrongs and intrusions on reservation by non-Indians who were previously held answerable, by way of damages actions in state court, for such misconduct toward Indians.

The legislative distinction established by Chapter 27-19, between similarly situated tribal Indian plaintiffs and non-Indian plaintiffs, creates a system of state court access that rests solely on differences in racial or ethnic characteristics. This distinction entitles a non-Indian defendant in state court to the automatic dismissal, in these circumstances, of any tribal plaintiff's damages action against him. However, that same defendant, under Chapter 27-19's system of state court access, is held to answer for any non-Indian's damages action in these same circumstances.

This Court has never approved state legislative action—such as Chapter 27-19—that substantially reduces, or

terminates, the state administered rights, or benefits, that tribal Indians are otherwise entitled to under state law. This Court has approved state statutes, enacted under the authority of federal law, that have increased, not reduced, the level of governmental legal protection accorded to tribal Indians' rights on reservation. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 499-502 (1979).

This Court held, in its prior opinion in this matter, that Chapter 27-19 is not insulated by federal law, particularly Public Law 280, from scrutiny under the state or federal constitutions. *Three Affiliated Tribes v. Wold*, 104 S.Ct. 2267, 2277 (1984). Chapter 27-19, petitioner submits, is subject to strict, or heightened, judicial scrutiny as ethnically, or racially, based state legislation that curtails, or terminates, the civil liberties of a distinct ethnic or racial group. *Regents of University of California v. Bakke*, 438 U.S. 265, 291 (1978) (all legal restrictions which curtail the civil rights of a single racial group are immediately suspect).

Strict, or heightened, judicial scrutiny of Chapter 27-19, is appropriate, also, because the court below upheld that statute as protective, or benign, state legislation that benefits tribal Indians residing on reservations within the state. Such ostensibly protective, or benign, state legislation is subject to strict, or heightened, judicial scrutiny to make sure that, in practice, it does not fence the regulated minority out of important state controlled processes or represent a racial stigma. See *United Jewish Organization v. Carey*, 430 U.S. 144, 172-176 (1977).

The court below erred in holding that the state legislature may, consistent with governing federal Indian law, impose Chapter 27-19, N.D.C.C., on tribal Indians residing on reservations within the state.

Chapter 27-19, purporting to extend state civil jurisdiction over tribal Indians on reservations within the state, upon tribal consent alone, has been preempted by Congress' enactment of Public Law 90-284. 25 U.S.C. Secs. 1321-1326 (1983). Chapter 27-19 is also preempted by governing federal Indian law and policy that prohibits any state regulation of tribal Indians that has the potential for significantly disrupting the economic, or governmental, stability of the tribes and their members.

Congress has exercised its plenary authority over Indian affairs by enacting a statute, Title IV of Public Law 90-284, 82 Stat. 79, that has been held by this Court to prohibit any federally unauthorized jurisdictional transfers by the tribes, or their members, of civil authority over Indian affairs to the states. *See Kennerly v. District Court*, 400 U.S. 423 (1971). There is, therefore, a direct and irreducible conflict between Chapter 27-19, and Public Law 90-284, as the federal law that controls the future transfer of federal jurisdiction over Indian affairs to the states. The North Dakota Supreme Court had regarded this individual consent provision of the state jurisdictional statute as having been preempted by the congressional enactment of Public Law 90-284. *See Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975). Section 27-19-05 conflicts directly with that statute's requirement that any future federal jurisdictional transfers to a state must be approved by a majority vote of the adult tribal Indians, affected by such

a transfer, at a federally supervised election. 25 U.S.C. sec. 1326 (1983) (J.A. 45-46). However, the court below read this Court's prior opinion in this matter as positively authorizing the state legislature to apply this provision to regulate tribal Indians on reservations. (J.A. 28). Therefore, the state court repudiated its prior holding in *Nelson* and revived that Section 27-19-05, N.D.C.C., as the governing state law regulating tribal Indians' access to state court. (J.A. 28). But it is clear, from this court's opinion in this matter, that its holding in *Kennerly* has not been revised, or overruled, as assumed by the court below so as to affirmatively authorize the state to impose Section 27-19-05 on tribal Indians on reservations. *See Three Affiliated Tribes v. Wold*, 104 S. Ct. 2267, ft. 11 at 2276 (1984).

Further, Chapter 27-19 is preempted by governing federal law and policy because it has the potential for disrupting, or undermining tribal government independence and sovereignty over its reserved lands and members.

Tribal governments, as a condition for maintaining a damages action against a non-Indian engineering firm in state court, must consent to general state judicial jurisdiction over their person and property. The tribes, under the terms of this statute, would appear to be subject, not only to liability for money, damages in all cases, but to declaratory and injunctive relief, as well. This requirement amounts to a general waiver of the tribes' immunity to suit. State attempts to regulate tribal governments directly, such as is embodied in Chapter 27-19, have been found to be especially objectionable to the principles of federal Indian policy. *See Bryan v. Itasca County*, 426 U.S. 373, 388 (1976). This is because the states' exercise of

such authority over tribal governments has the potential for reducing these governments to little more than "private, voluntary, organizations." *Bryan*, 426 U.S., at 388.

ARGUMENT

I

THE EXCLUSION OF TRIBAL PLAINTIFFS FROM ACCESS TO STATE COURT, IN CIRCUMSTANCES WHERE NON-INDIAN PLAINTIFFS MAY CLEARLY MAINTAIN SUCH ACTIONS, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Chapter 27-19, N.D.C.C., purporting to extend state civil jurisdiction over tribal Indians residing on reservations within the state upon their consent, creates an explicit legislative classification that so fundamentally disadvantages tribal Indians, with regard to fundamental legal rights, as to deny them the due process and equal protection of the laws.¹

A. Tribal Indians Residing on Reservation Within North Dakota, Prior To The Enactment Of Chapter 27-19, Were Guaranteed Access To State Court Forums, By Virtue Of The "Open Courts" Provision of the State Constitution, For The Enforcement of Their Damages Claims Against Non-Indians, Even If Those Claims Arose on Reservations Within The State.

¹This case involves only state action, not authorized federal action under Public Law 280, 67 Stat. 589. *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct. 2267 (1984).

Tribal Indians, before enactment of Chapter 27-19 in 1963, were accorded, under state law, the affirmative civil right—pursuant to the "open courts" provision of the state constitution—to enforce their damages claims against non-Indians in state court forums even if those claims arose on reservations within the state. *N.D. Const., Art. I, sec. 9* (the state courts are open to every man to provide a remedy for any wrong that may be done to him or his property). See *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (1957).

The state court held, as well, in *Vermillion*, that the state's judicial jurisdiction extended to tribal Indians' damages claims arising on reservation.² *Id.* at 438. However, the court below held that the enactment of Chapter 27-19 effected a legislative overruling of the *Vermillion* decision. That statute's enactment terminated any state judicial protection that may have been previously

²This Court, in its earlier decision in this matter, recognized that the "open courts" provision of the state constitution, as well as the *Vermillion* decision based on that provision, established an independent state jurisdictional basis that allowed the state judicial enforcement of tribal Indians' damages claims against non-Indians for claims arising on reservations within the state. *Three Affiliated Tribes v. Wold*, 104 S. Ct. 2267, 2274 (1984).

This Court also held that federal law, particularly Public Law 280, enacted subsequent to the *Vermillion* decision, had not preempted the state courts' jurisdiction to enforce tribal Indians' claims against non-Indians for wrongs occurring on Indian reservations. *Three Affiliated Tribes v. Wold*, 104 S. Ct. 2267, 2274. Tribal Indians have historically resorted to state court forums, this court found, as an effective means of enforcing their property rights against non-Indians. Cf. *Felix v. Patrick*, 145 U.S. 317 (1882) (Tribal Indians are entitled to sue non-Indians in Nebraska's courts, for state created remedies, pursuant to the "open courts" provision of that state's constitution).

accorded tribal Indians' damages claims against non-Indians in state court. Subsequent to the enactment of Chapter 27-19, the court below held, whatever judicial protection tribal Indians may claim in these circumstances depends solely upon the terms of that statute.

Chapter 27-19 bars tribal Indians, the court below held, from access to state court forums, for the enforcement of their damages claims against non-Indians for wrongs occurring on Indian reservations within the state, unless the Indians affected consent to the extension of state civil jurisdiction over their person and property on reservation. Tribal Indians, after the enactment of Chapter 27-19, are rendered vulnerable on reservation to substantial wrongs and intrusions by non-Indians.

Chapter 27-19, as construed and applied by the court below, also imposes new, and unique, statutory burdens on tribal Indians who seek to exercise their due process rights in state court. These statutory burdens are unrelated to the Indians' status as citizens and residents of North Dakota. That statute, the court below held, both "requires and permits" the state courts to automatically dismiss tribal Indians' damages actions against non-Indians in these circumstances. Tribal Indians, if they wish to have access to a state court forum for the enforcement of their damages actions in these circumstances, must now consent to the virtually complete extension of state civil jurisdiction over their person and property on reservation. Secs. 27-19-05; 27-19-08; 27-19-13; N.D.C.C.

B. Chapter 27-19, as Construed and Applied By The Court Below, Constitutes a Selective Withdrawal, or Termination, of State Judicial Protection of Tribal Indians' Damages Claims Against Non-Indians.

The Tribe argued before the court below that the statutory termination of state judicial protection over tribal Indians' damages claims against non-Indians, otherwise assured to them by the state constitution and state judicial precedent, would violate the due process and equal protection guarantees of the Fourteenth Amendment. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) ("having made access to the courts an entitlement or necessity, the state may not deprive someone of that access unless the balance of state and private interest favors the government scheme"); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) ("a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some opportunity to protect it").

The Tribe also argued before the court below that Chapter 27-19 was subject on judicial review to strict, or heightened, judicial scrutiny. Chapter 27-19 the Tribe pointed out, is directed exclusively at a discrete and insular minority, tribal Indians residing on federal reservations within the state. *Plyler v. Doe*, 457 U.S. 202 (1982). This standard of review was applicable as well, the Tribe pointed out, because Chapter 27-19 curtails or burdens that minority's exercise of a fundamental, or important, civil right. *United States v. Carolene Products*, 304 U.S. 144, 152-153, ftn. 4 (1938). However, the court below emphatic-

ally rejected the Tribe's contention that Chapter 27-19 operated to deprive tribal Indians of any property right, or of any right of access to state court, saying:

In our view, Affiliated has not been *deprived* of a protected interest or denied access to state courts because of legislative or judicial action by the state, but rather, to the contrary, jurisdiction has been offered by the state over all civil causes of action which arise on an Indian reservation upon acceptance by Indian people as provided by law. The *Indian people* have deprived themselves of access to state courts because they have not accepted state jurisdiction in the manner provided for in Chapter 27-19 N.D.C.C. The *tribes* will deprive themselves of access to the state courts in the future if they do not avail themselves of the opportunity provided for acceptance of state jurisdiction through our construction of Section 27-19-05, N.D.C.C., today. (Emphasis in original.) (J.A. 32)

According to the court below, any due process or equal protection objections that tribal Indians may make to Chapter 27-19 are fully answered by the proposition that tribal Indians have the choice, under the statute, to either accept general civil jurisdiction over their person and property on reservation, a condition never before imposed on their bringing a damages action in state court, or to forego the opportunity to enforce their damages claims against non-Indians in state court.

However, this proposition does not meet the obligation imposed on the judiciary to scrutinize the legislative classificatory system at issue in order to determine whether the disparate treatment accorded the legislatively regulated class, tribal Indians, arbitrarily denies them the due process or equal protection of the laws. *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966) ("the Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes"). The

court's holding below establishes only "that the [state] legislature sought to terminate certain claims and succeeded in doing so." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 441 (1982) (Separate opinion of Justice Blackman, joined in by Justices Brennan, Marshall and O'Connor).

C. Chapter 27-19 Is Subject on Judicial Review To Strict, or Heightened, Judicial Scrutiny.

Chapter 27-19—as an ethnically, or racially, based state statute affecting an important civil liberty—is subject to strict, or heightened, judicial scrutiny under the standards declared by this court.³ See *United Jewish Organization v. Carey*, 430 U.S. 144, 167 (1977) (such state legislation is subject to heightened judicial scrutiny to make sure that it does not, in practice, fence the regulated minority out of important state controlled processes); *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (all legal restrictions which curtail the civil rights of a single racial group are immediately suspect).

The state court, characterizing the state legislative purpose behind the enactment of Chapter 27-19 as protective and benign in nature, upheld that statute against petitioner's contention that it subjected a discrete, racial, or ethnic, minority—tribal Indians residing on federal reservations—to constitutionally impermissible, disadvantaged treatment regarding a fundamental civil liberty—access to state court.⁴ (J.A. 32-35).

This Court has, on occasion, approved ethnically or racially based state legislation that is intended to enhance

³The Tribe argued in the court below that federal civil rights statutes, 42 U.S.C. Secs. 1981 and 1983, affirmatively protected tribal Indians' "right to sue" in these circumstances. Cf. *Siltner v. Rhay*, 322 F.2d 314 (9th Cir. 1963); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1972).

⁴Access to courts is an important right. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)

a distinct minority's access to state political or educational processes so as to minimize the consequences of racial discrimination. See *United Jewish Organization v. Carey*, 430 U.S. 144, 165 (1977) (this Court upheld a state reapportionment plan that increased the size of certain non-white minorities in certain voting districts against an equal protection challenge because the state legislative purpose was to enhance the opportunity for the election of non-white representatives from those districts); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (this Court, while affirming the judicial invalidation of a university's special admissions program for minorities, reversed the lower court's judgment insofar as it prohibited petitioner from taking race into account as a factor in its future admissions decisions).

Such state legislation, however, is subject to heightened judicial scrutiny to make sure that it does not in practice fence the minority out of the state controlled processes or represent a racial stigma. See *Carey*, 430 U.S., at 167. Further, such state legislation, ostensibly benign in purpose, is still inherently suspect and is subject to the

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(the right of access to court is one aspect of the right to petition protected under the First Amendment); *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 263 U.S. 544, 551 (1923) (the right of access to state court is protected by the Equal Protection and Due Process Clauses of the Fourteenth Amendment); *Chambers v. Baltimore & Ohio Railroad Company*, 207 U.S. 142, 148 (1907) (the right to sue and defend in courts is a basic constitutional right).

State interference with this right of access also violates the federal civil rights statutes enacted under the authority of the Fourteenth Amendment. *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1972) (access to courts must be meaningful and effective; state interference with that right of access gives rise to a claim under 42 U.S.C. sec. 1983); *Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963) (reasonable access to state court is preservative of all other rights).

most exacting judicial examination. *Bakke*, 438 U.S., at 291 (all legal restrictions which curtail the civil rights of a single racial group are immediately suspect).

Application of the three-pronged analysis, developed by Justice Brennan, in his concurrence in part in *Carey*, to Chapter 27-19 lays bare why this statute is constitutionally bad. *Carey*, 430 U.S., at 172-176.

First, Chapter 27-19, in fact, results in the disadvantaged treatment of its supposed beneficiaries by excluding tribal Indians alone from access to state court in circumstances where non-Indians are clearly entitled to maintain such actions. See *North Dakota ex rel. Moug v. North Dakota Automobile Assigned Claims Plan*, 341 N.W.2d 623, 626 (N.D. 1983) (a non-Indian assignee of a tribal Indian's personal injury claim arising on a reservation may sue a non-Indian entity in state court, even though the Indian assignor may not maintain the action. The dissent would have held that the action was barred because the tribal assignor could not have maintained the action against a non-Indian in these circumstances).

Further, disabling tribal Indians from suing non-Indians in state court for state-created remedies does not protect them. It renders them vulnerable to substantial wrongs and intrusions by non-Indians. A non-Indian defendant is entitled, under the statute, to the automatic dismissal of any tribal Indian's damages actions arising on reservation if the Indian chooses not to comply with the terms of the statute. This court has recognized that tribal Indians' access to courts, including state courts, is an important feature of federal policy that enables Indians to protect their property and rights against intrusions by non-Indians. See *Three Affiliated Tribes v. Wold*, 104 S. Ct. 2267, 2274 (1984); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370-371 (1968); *Creek Nation v. United States*, 302 U.S. 618 (1938).

Second, Chapter 27-19 stigmatizes a discrete racial or ethnic group—tribal Indians—that had been prior to 1963, legally indistinguishable from any other litigants in this category of actions. *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957). Individual tribal Indians are now called upon to bear a state legislative burden unrelated to their status as citizens and residents of North Dakota. See *Regents of University of California v. Bakke*, 438 U.S. 265, 298 (1978) (nothing in the Constitution supports the proposition that individuals may be made to suffer otherwise impermissible burdens in order to fulfill a state legislative policy directed at the ethnic or racial group of which they are a member).

This state statute, by removing judicial protection previously accorded tribal Indians' property rights in these circumstances, subjects tribal Indians residing on reservation to a distinct and inferior position in the law.⁵ Cf., *Hunter v. Erickson*, 393 U.S. 385, 386-7 (1969) (the amendment of a city charter that made it more difficult for racial minorities to protect themselves against racial discrimination, by imposing special burdens on them within the political process, was held to violate the Equal Protection Clause of the Fourteenth Amendment). State statutes that deny tribal Indians the right to sue in state court are usually premised, according to a leading commentator on federal Indian law, on the mistaken assumption that tribal Indians are inferior in the law and need

⁵The injurious effects, both tangible and psychological, of stigmatizing inequalities in the law have been acknowledged by this Court in major equal protection cases. Karst, *Equal Citizenship under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 6 (1977).

be accorded only such protection as the state may choose to extend to them. See Cohen, *Handbook of Federal Indian Law*, sec. 6, "The Right to Sue," p. 162 (Univ. of N. Mex. Press, 1971 reprint of 1942 ed.).

Third, Chapter 27-19, as construed and applied by the court below, imposes new and unique statutory burdens on tribal Indians residing on reservations within the state—burdens that are unrelated to their status as citizens and residents of North Dakota.⁶ This state legislative program, as declared by the court below, has as its ostensible goal the protection of tribal Indians from unwanted state jurisdictional intrusions on reservation. However, in practice, that statute conditions tribal Indians' access to state court to enforce their damages claims against non-Indians upon their acceptance of virtually complete state civil

⁶State exclusions of Indians from state rights and benefits because of the Indians' unique status under federal law or their residence on federal reservations have been uniformly struck down in both state and federal courts. See, e.g., *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) (state statute restricting the right of reservation Indians to vote for county officers struck down as violative of the equal protection clause of the Fourteenth Amendment); *Arizona ex rel Arizona State Board of Public Welfare v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954) (state welfare plan restricting benefits of tribal Indians residing on reservation within the state disapproved by federal government); *Goodluck v. Apache County*, 417 F.Supp. 13 (D. Ariz. 1975) (Three Judge Court); *aff'd sub nom Apache County v. United States*, 429 U.S. 876 (1976) (reservation Indians, as citizens of the United States and of Arizona, are entitled to the reapportionment of the county supervisorial districts according to population); *Shirley v. Superior Court*, 109 Ariz. 510, 513 P.2d 939 (1973), cert. denied, 415 U.S. 917 (1974) (fact that reservation Indian is immune from service of civil process and is not a taxpayer is no bar to his holding county office); *Acosta v. San Diego County*, 126 Ca. App. 2d 455, 272 P.2d 92 (1954) (indigent reservation Indians, as state citizens, are entitled to direct county relief).

jurisdiction over their person and property on reservation, in subject matter areas unrelated to their suits against non-Indian defendants. Secs. 27-19-08, 27-19-13, N.D.C.C.

State jurisdictional requirements, requiring litigants to surrender important rights as a condition of access to state courts, are prohibited by the due process and equal protection clauses of the Constitution. See *Frost v. Railroad Commission*, 271 U.S. 583, 594 (1926); quoted with approval in *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 664-665 (1981). This court has recognized that tribal Indians have the right, vested in them under federal law, to make their own laws on reservation and be governed by them. See *Williams v. Lee*, 358 U.S. 217 (1959); *Fisher v. District Court*, 424 U.S. 382 (1976). Chapter 27-19 requires the tribal Indians to surrender these rights, by acceding to state civil jurisdiction over their person and property on reservation, as a condition for maintaining their damages actions against non-Indians in state court.⁷ Cf., *Chase v. McMasters*, 573 F.2d 1011 (8th Cir. 1978), *cert. denied* 439 U.S. 965 (1978) (refusal of a city to extend water and sewer services to a tribal Indian's trust property, as long as it remained in trust and exempt from local property taxes, held to deprive the tribal Indian of the civil right, protected under 42 U.S.C. sec. 1983, to enjoy the full beneficial use of her trust property as guaranteed by 25 U.S.C. sec. 465).

⁷The tribal government of the Three Affiliated Tribes pursuant to the Indian Reorganization Act, 25 U.S.C. § 461, et seq., has adopted a comprehensive civil code that governs the internal relations of the tribal members. See *Tribal Code of the Fort Berthold Indian Reservation*. There is a virtual point-by-point conflict between the provisions of that code and the provisions of Chapter 27-19. Sec. 27-19-08, N.D.C.C.

Chapter 27-19, moreover, is a direct statutory burden on tribal Indians' exercise of their due process rights, guaranteed to them as citizens and residents of North Dakota, to sue non-Indians for damages in state courts that otherwise have jurisdiction over such actions. Cf., *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 716-718 (1981); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256-259 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 604 (1969); *United States v. Jackson*, 390 U.S. 570-583 (1968); *Sherbert v. Verner*, 374 U.S. 398, 404-407 (1963). Existing constitutional precedent simply does not support the state legislative exclusion of a class from court for reasons unrelated to their status as citizens and residents of the state. See *Boddie v. Connecticut*, 401 U.S. 371, 374-375 (1971); compare, *Sosna v. Iowa*, 419 U.S. 393 (1975) (state durational residency requirements for divorce upheld).

D. Chapter 27-19 Is Not Supported By A Compelling, or Substantial, State Interest so as to Justify the Exclusion of Tribal Indians, Residing on Reservations Within the State, From State Court in These Circumstances.

State legislative classifications that single out, for discriminatory treatment a discrete and insular minority are subject to a more severe and searching standard of judicial review than is otherwise the case. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *United States v. Carolene Products*, 304 U.S. 144, 152-153, ftn. 4 (1938). Tribal Indians are barred from North Dakota courts solely because the state legislature has enacted a state statute, Chapter 27-19. That statute prohibits damages actions, for on-

reservation wrongs, by tribal Indians against non-Indians in state court except as that statute may allow. This legislation singles out, on its face, tribal Indians as the exclusive category to be affected by such regulation.

This Court, in its earlier decision in this matter, held that Chapter 27-19 was not insulated by federal law, particularly Public Law 280, from state or federal constitutional scrutiny. *See Three Affiliated Tribes v. Wold*, 104 S. Ct. 2267, 2277 (1984). However, the court below disposed of the Tribe's contention that Chapter 27-19 was subject to strict, or heightened, judicial scrutiny by way of a citation to this Court's decision in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979).

That decision involved a Washington state statute adopted under the authority of Public Law 280. That statute was found by this Court to be constitutional because it did not, in practice, result in the discriminatory treatment of tribal Indians with respect to important governmental legal services. *Id.*, fn. 46, at 500. This Court also held in the *Yakima* decision that states, unlike the United States, do not enjoy a unique legal relationship with tribal Indians that would allow the states to disregard the Indians' due process and equal protection rights that are protected by the Constitution. *Id.* at 501.

Therefore, Chapter 27-19 must stand on its merits as being a necessary state legislative measure to meet some compelling, or substantial, state need. *Cf., Craig v. Boren*, 429 U.S. 190, 199 (1976). Strict scrutiny requires that on judicial review of racially, or ethnically, discriminatory legislation that the party defending the legislation must establish that it serves a compelling govern-

mental interest and is "necessary . . . to . . . the safeguarding of [that] interest." *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Justice Powell).

The court below held that tribal Indians, since they "demanded this unique treatment" under Chapter 27-19, cannot now "reasonably complain" of it. (J.A. 35). However, insofar as the scanty legislative record of Chapter 27-19 goes, the tribal Indian leaders uniformly opposed the enactment of any special state legislation, protective or otherwise, that affected the rights of tribal Indians residing on the reservations in North Dakota. (J.A. 41). Furthermore, both the power, and the choice, to enact Chapter 27-19 was in the hands of the state legislature — not the tribal Indians. *See Perry, Modern Equal Protections: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1035 (1979) ("Given a [legislative] choice between imposing a disadvantage on nonwhites only or, instead, accepting the greater financial costs of a racially-neutral program and spreading those costs widely throughout the population, a decision to do the former is very likely invidious and is reasonably deemed presumptively so.").

II

CHAPTER 27-19 IS PREEMPTED BY GOVERNING FEDERAL LAW BECAUSE IT ATTEMPTS TO REGULATE INDIAN AFFAIRS IN WAYS THAT ARE OUTSIDE THE PERMISSIBLE SCOPE OF STATE POWER.

Chapter 27-19, enacted by the state legislature in 1963, purports to extend virtually complete state civil jurisdiction over tribal Indians residing on reservations upon their

consent alone. However, the court below also construed that statute as requiring tribal individuals, including tribal governments, to consent to this extension of state civil jurisdiction over their person and property on reservation as the condition for bringing a damages action against a non-Indian in state court for any wrong occurring on reservation. (J.A. 29). State courts, by virtue of this tribal consent, purport to acquire jurisdiction over all civil causes of action, and obligations, that may arise against the consenting tribal individuals, or governments. Sec. 27-19-13, N.D.C.C. Further, other provisions of Chapter 27-19 purport to extend general state legislative authority over the consenting tribal individuals. Sec. 27-19-08, N.D.C.C. The court below held that the Tribe's required consent under this statute, as a condition for maintaining its damages action against a non-Indian engineering firm in state court, would subject the Tribe to the general judicial jurisdiction of the court for all cases. (J.A. 29).

This statute is preempted by governing federal law in Indian affairs. First, it calls for a federally unauthorized tribal transfer to the state, based on tribal consent alone, of extensive federal jurisdiction over Indian affairs. Second, it conflicts with the governing federal law and policy in Indian affairs that prohibits any state regulation of tribal Indians that has the potential for the significant economic, or governmental, disruption of the tribes and their members.

A. Congress' Enactment of Public Law 90-284 Has Preempted Any Authority North Dakota May Have Had to Condition Tribal Indians' Access to State Court on a Tribal Transfer, or Cession, to the State of Civil Jurisdiction Over Their Members or Reserved Lands.

Federal authority over Indian affairs originally precluded any exercise of state jurisdiction over tribal Indians on their reserved lands. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Today, not all state regulation that affects tribal Indians on reservation is *per se* preempted by this federal authority.⁸ However, the continued vitality of the *Worcester* principle assures tribal Indians that they are free, on reservation, of burdensome state regulation of their person or property except as may be expressly authorized by treaty or act of Congress. *See Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Essentially, absent governing acts of Congress, the question has always been whether [a state] action infringed on the right of reservation Indians to make their own laws and be ruled by them").

The analytic focus is on the applicable federal treaties and statutes that define the limits of state power over tribal Indians on reservation. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, fn. 8 at 172 (1973).

⁸See, e.g., *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (the minimal burden of collecting state sales tax that is imposed on an Indian retailer for cigarette sales to non-Indians does not infringe on any right to tribal self-government); *Puyallup Tribe v. Washington Department of Fish & Game*, 433 U.S. 165 (1977) (state regulation of individual tribal members' fishing rights on reservation may be permitted for necessary wildlife conservation purposes).

This analysis also recognizes that Congress may exercise its power over Indian affairs to preempt any state legislative authority in this area. *United States v. Kagama*, 118 U.S. 375, 384 (1886). This preemptive authority of Congress extends to oust state regulation of tribal Indians, or their property, that is inconsistent with a clear federal policy or interest in Indian affairs.⁹ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Congress has exercised its power over Indian affairs, by enacting Public Law 90-284, so as to preempt any authority that North Dakota may have had to condition tribal Indians' access to state court, in these circumstances, on a tribal transfer, or cession, to the state of civil jurisdiction over their members or reserved lands. See *Kennerly v. District Court*, 400 U.S. 423, 428 (1971); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 497-498, fn. 45 (1979).

Therefore, there is a direct and irreducible conflict between Chapter 27-19 and Public Law 90-284 as the governing federal law that controls the future transfer of federal jurisdiction over Indian affairs to the states.¹⁰

⁹Congress' power over Indian affairs has been given negative effect such that, even absent affirmatively preemptive Congressional action, the states are generally barred from legislating with respect to Indian affairs. See, e.g., *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). The presence of a clearly contrary federal interest or policy is sufficient to preempt an inconsistent state law. See *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (1982).

¹⁰Title IV of the Indian Civil Rights Act, enacted in 1968 as part of a general civil rights act, repealed Section 7 of Public Law 280 and replaced it with an exclusive federal procedure, requiring Indian consent, whereby states in the future could acquire jurisdiction over Indian affairs. Secs. 402(a), 403(b), 404, 406 of Public Law 90-284, 82 Stat. 629, now codified at 25 U.S.C. secs. 1322, 1324 and 1326 (1983).

Section 27-19-05 of the state statute purports to extend state civil jurisdiction over the person and property of any tribal Indian residing on an Indian reservation upon the consent of the affected tribal Indian. Section 27-19-08 of that same statute purports to extend, by virtue of that consent, state legislative authority over a broad category of subject matter, recognized by the court below as being within the exclusive jurisdiction of the tribes under federal law.

However, Title IV of Public Law 90-284, has been construed by this Court as evidencing Congress' intent to completely occupy this field so as to exclude the future state acquisition of any jurisdiction over Indian affairs, including by tribal transfer, except as allowed by the federal statute. See *Kennerly v. District Court*, 400 U.S. 432 (1971) (this court held that this federal statute prohibited Montana's assumption of civil jurisdiction over tribal Indians on reservation even with the consent of the tribal government). See also, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 497 (1979).

This Court, based on the plain terms of Public Law 90-284, concluded that Congress intended that statute to be the exclusive legislative means by which states may acquire in the future, by transfer from the federal government alone, any measure of federal jurisdiction over tribal Indians on reservation. *Kennerly*, 400 U.S. at 429.¹¹

¹¹A leading commentator on the legislative history of this statute confirmed that this Court's holding in *Kennerly* was consistent with the Congressional purpose and intent behind the enactment of that statute. See *Burnette, A Historical Analysis of the 1968 "Indian Civil Rights Act,"* 9 Harv. Journal on Legis. 557, 620-621 (1972). (hereinafter "Burnette").

A brief review of the legislative history of Senate Bill 1843, the consolidated bill that was ultimately enacted as the law governing such transfers, confirms this conclusion. Congress clearly intended that the federal procedures, established as Title IV of Public Law 90-284, serve as the exclusive legislative means by which states would acquire any measure of civil jurisdiction over Indian affairs in the future. *See Senate Report No. 841 Accompanying S. 1843*, 90th Congress, 1st Session, pp. 11-12 (1967).

The Court below construed Chapter 27-19 as requiring individual tribal members, including tribal governments, to consent to the extension of state civil jurisdiction over their property on reservation as a condition of access to state court. The North Dakota Supreme Court had regarded the individual consent provision of the state jurisdictional statute, Section 27-19-05, as having been preempted by the congressional enactment of Public Law 90-284. *See Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975). Section 27-19-05 conflicts directly with the statutory requirement that any future federal transfer of jurisdiction over Indian affairs to a state must be approved by a majority vote of the adult tribal Indians, affected by such a transfer, at a federally supervised election.¹² 25 U.S.C. sec. 1326 (1983). However, the court below read this

¹²This tribal consent provision, codified at 25 U.S.C. sec. 1322, was regarded by Senator Ervin, the chief sponsor of the legislation, as the most important safeguard Congress could provide against future state encroachment on tribal authority on reservation. *See Burnette*, at 557-558; *See also Hearings on H.R. 15419 before the House Subcommittee on Indian Affairs*, 90th Cong., 2d Sess. (March 29, 1968), pp. 108-110 (testimony of tribal representatives characterized the imposition of the tribal consent provision, controlling the future extension of state civil jurisdiction over tribal Indians, as the "most important" aspect of the proposed legislation).

Court's opinion in this matter as positively authorizing the state legislature to apply this provision to regulate tribal Indians on reservations. Therefore, the state court repudiated its prior holding in *Nelson* and revived that state statutory provision as the governing state law regulating tribal Indians' access to state court in these circumstances. (J.A. 28).

But it is clear from this Court's opinion in this matter that its holding in *Kennerly* has not been revised, or overruled, as was assumed by the court below so as to affirmatively authorize the state to impose Section 27-19-05 on tribal Indians on reservations. *Three Affiliated Tribes v. Wold*, 104 S. Ct. 2267, fn. 11 at 2267 (1984).

B. Chapter 27-19, Has the Potential for the Significant Economic, or Governmental, Disruption of the Tribal Governments and Is Therefore Preempted by Governing Federal Law And Policy in Indian Affairs.

Chapter 27-19 is preempted by governing federal Indian law because it has the potential for disrupting or undermining tribal governmental independence and sovereignty over its members and reserved lands. That statute requires tribal governments, as a condition for maintaining their damages actions against non-Indians in state court, to consent to general state judicial jurisdiction over their person and property.¹³ Sec. 27-19-13, N.D.C.C.

¹³State statutory conditions that frustrate, or burden, important congressional policies are subject to federal preemption. *See, e.g., Nash v. Florida Industr. Commission*, 389 U.S. 233, 238-39 (1967) (state statute refusing compensation for unemployment due to labor disputes as applied to an employee filing a charge with the National Labor Relations Board held to frustrate a congressional purpose in encouraging such filings); *Hill v. Florida*, 325 U.S. 538, 541-42 (1945) (state statute conditioning the functioning of a union's collective bargaining representative upon the fulfillment of certain state requirements held to frustrate the congressional guarantee of "full freedom" to select representatives).

This requirement amounts to a general waiver of the tribes' governmental immunity to suit. The state courts, by virtue of this tribal waiver, would have jurisdiction over all causes of action and obligations that may arise against the tribe, whether on or off reservation, during the period of such consent. Sec. 27-19-13, N.D.C.C. The only limitation on this general state judicial jurisdiction, acknowledged by the court below, is that some tribal property may be exempt by law from the state courts' general authority to levy and execute on the property of a judgment debtor. (J.A. 28). This state statute also appears to open the tribes, not only to liability for money judgments, but to liability for declaratory and injunctive relief in state courts.

State attempts to regulate tribal governments directly, such as is embodied in Chapter 27-19, have been found by this Court to be especially objectionable under the principles of federal law and policy governing Indian affairs. See *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976). This is because the exercise of such unbridled state authority over tribal governments has the potential for reducing those governments to little more than "private, voluntary organizations." *Bryan*, 426 U.S., at 388.

There is a clear federal interest in assuring that the federal policies, which underlie the principle of tribal governmental immunity, are not undermined by contrary state

law.¹⁴ The principle of tribal sovereign immunity to suit is aimed at preventing both the financial and governmental disruption of the tribal government. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 513 (1940) (this court held that the doctrine of sovereign immunity "is particularly applicable to Indian nations with their unusual governmental organizations and peculiar problems"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-57 (1978); *Ramey Construction Company v. Apache Tribe*, 673 F.2d 315, 319 (10th Cir. 1982); *United Nuclear Corp. v. Clark*, 584 F.Supp. 107, 108 (D.D.C. 1984).

¹⁴No federal court has ever allowed a general waiver of tribal immunity from suit so as to authorize courts to hear liability suits based on tribal governmental acts. See, e.g., *Cold v. Confederated Tribes*, 478 F.Supp. 462, 463 (D. Mont. 1978), *aff'd.*, 642 F.2d 276 (9th Cir. 1981). But see *Martinez v. Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962) (en banc) holding that "sue and be sued" clause waived any tribal immunity to suit. At most it appears that a tribal government may have authority to specifically waive its immunity to suit to the extent of allowing a court to adjudicate the validity of a tribal law. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) (en banc), *affirmed on other grounds*, 455 U.S. 130 (1982). Such a general waiver has been recognized by courts as likely having the impact of severely impairing the tribe's economic position in business matters and dealings with non-Indians. Cf. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F.Supp. 1127, 1131 (D. Alaska 1978).

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the judgment of the Supreme Court of North Dakota be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

JAN 8 1986

JOSEPH F. SPANIEL, JR.
CLERK

(8)
No. 84-1973

In the Supreme Court of the United States

October Term, 1985

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,

Petitioner,

vs.

WOLD ENGINEERING, P.C., A NORTH DAKOTA
PROFESSIONAL CORPORATION,

Respondent,

vs.

SCHMIDT, SMITH & RUSH,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH DAKOTA

**BRIEF OF RESPONDENT,
WOLD ENGINEERING, P.C.**

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a North Dakota law enacted as a compromise to conflicting State and tribal jurisdictional interests, and by which the State of North Dakota terminated "residuary" or preexisting jurisdiction over actions arising in Indian country and involving Indian litigants, is repugnant to the due process and equal protection clauses of the United States Constitution.

2. Whether North Dakota may require, consistent with governing federal law, an Indian tribe to submit to State court jurisdiction as a condition to the tribe's maintenance of a tort action in State Court.

II. PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

1. Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner;
2. Wold Engineering, P.C., a North Dakota Professional Corporation, Respondent;
3. Schmidt, Smith & Rush, Respondent;
4. Devils Lake Sioux Tribe, and Standing Rock Sioux Tribe as *amicus curiae*, in support of Petitioner;
5. Turtle Mountain Band of Chippewa Indians as *amicus curiae*, in support of Petitioner; and
6. State of North Dakota as *amicus curiae*.

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Section 32-12.1-15, N.D.C.C.	6, 36
5. Miscellaneous Authority	
Prosser, <i>Law of Torts</i> , 4th Ed., §131	36

IV. OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Opinion, and Judgment of Dismissal Without Prejudice, from the North Dakota District Court, Northwest Judicial District, Ward County, Civil No. 46,392, the Honorable Wallace D. Berning, presiding, is not reported. This decision was first appealed to the North Dakota Supreme Court, and was affirmed. *Three Affiliated Tribes v. Wold Engineering, et al.*, 321 N.W.2d 510 (N.D. 1982).

Three Affiliated Tribes sought review by Writ of Certiorari, which was issued by this Court on April 25, 1983. *Three Affiliated Tribes v. Wold Engineering, et al.*, U.S., 76 L.Ed.2d 805 (1983). On review, the North Dakota Supreme Court's decision was vacated and remanded for further proceedings. *Three Affiliated Tribes v. Wold Engineering, et al.*, U.S., 81 L.Ed.2d 113 (1984).

Upon remand, the North Dakota Supreme Court vacated its earlier judgment, and ordered modification of the District Court's original opinion and judgment. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985). Three Affiliated Tribes sought review of this decision, again through petition for Writ of Certiorari. The petition for Writ of Certiorari was granted by this Court on October 15, 1985. *Three Affiliated Tribes v. Wold Engineering, et al.*, U.S., 88 L.Ed.2d 224 (1985).

V. JURISDICTIONAL STATEMENT

This case appears before this Court pursuant to Writ of Certiorari issued October 15, 1985.

VI. CONSTITUTIONAL PROVISIONS, AND STATUTES

A. United States Constitutional Provisions

Article I, Section 8, Clause 3.

The Congress shall have power:

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Amendment 14, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

B. Federal Statutes

Enabling Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2.

Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall

remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said states shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe.

Public Law 280, Chapter 505, United States Statutes at Large 67.

(Reprinted in full in Statutory Appendix Attached hereto.)

25 U.S.C. §1322. Reprinted in full in Statutory Appendix to Petition for Writ of Certiorari, Appendix pages 24-25.

25 U.S.C. §1323.

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of

title 18 of the United States Code [18 USCS §1162], section 1360 of title 28 of the United States Code [28 USCS §1360], or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

25 U.S.C. §1324. Reprinted in full in Statutory Appendix to Petition for Writ of Certiorari, Appendix page 25.

25 U.S.C. §1326. Reprinted in full in Statutory Appendix to Petition for Writ of Certiorari, Appendix pages 25-26.

C. North Dakota Constitutional Provisions

Article 1, §21 (N.D. Constitution of 1889).

The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise.

Article 16, §203 (Original Constitution of the State of North Dakota 1889).

COMPACT WITH THE UNITED STATES

The following article shall be irrevocable without the consent of the United States and the people of this state:

Section 203. First . . .

Second. The people inhabiting this state do agree and declare that they have forever disclaim all right and title to the unappropriated public lands lying

within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to the citizens of the United States residing without this state shall never be taxed at a higher rate than the lands belonging to the residents of this state; that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing in this article shall preclude this state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any acts of congress containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such extent, as is, or may be provided in the act of congress granting the same.

D. State Statutes

Chapter 27-19, N.D.C.C. Reprinted in full in Statutory Appendix to Petition for Writ of Certiorari, Appendix pages 27-31.

Section 32-12-02, N.D.C.C.

Action against state—When authorized—Where brought—Undertaking for costs. An action respecting

the title to property, or arising upon contract, may be brought in the district court against the state the same as against a private person. Such actions shall be brought in the county in which the property is situated, or the county in which the plaintiff resides. The plaintiff at the time of commencing such action shall file an undertaking with sufficient surety to be approved by the clerk of court to the effect that he will pay any judgment for costs that may be rendered against him.

Section 32-12.1-15, N.D.C.C.

State agencies authorized to purchase insurance.

1. The state or any state agency, bureau, or department may insure against liabilities provided by this chapter for its own protection and for the protection of any state employee. If a premium savings will result therefrom, the insurance policies may be taken out for more than one year, but in no event beyond a period of five years.
2. If the state or any state agency, bureau, or department shall purchase insurance pursuant to this section, the purchaser shall waive its immunity to suit only to the types of insurance coverage purchased and only to the extent of the policy limits of the coverage. Provided, the purchaser or its insurance carrier is not liable for claims arising out of the conduct of a ridesharing arrangement, as defined in section 8-02-07.
3. The insurance coverage authorized by this chapter may be in addition to insurance coverage which may be purchased by the state or any state agency, bureau, or department, or a political subdivision, under any other provision of law.

4. The attorney general shall appear and defend all actions and proceedings against any state employee for alleged negligence within the scope of employment in any court in this state or of the United States when the agency, bureau, or department employing the employee has not purchased liability insurance coverage pursuant to law. If both parties to an action are state employees, the attorney general shall determine which state employee the attorney general shall represent, and the other employee may employ counsel to represent the employee. If one of the adverse parties is a state agency, bureau, or department, the attorney general shall appear and defend the agency, bureau, or department in the manner otherwise provided by law.

VII. STATEMENT OF THE CASE

Petitioner, an Indian Tribe, hereafter "Three Tribes", contracted with the Respondent, a North Dakota Professional Corporation, hereafter "Wold Engineering", for the purpose of designing a water intake system for the Four Bears Village. Work on this project occurred entirely within the boundaries of the Fort Berthold Indian Reservation.

After construction of the system, Three Tribes complained the system failed. It initiated this action against Wold Engineering alleging the system was negligently designed. Suit was initiated in North Dakota District Court. After answer and assertion of a counterclaim against Three Tribes for breach of contract, Wold Engineering moved to dismiss the action for lack of subject matter jurisdiction. The Honorable Wallace D. Berning, Judge of the

District Court, found Three Tribes had failed to comply with existing state and federal statutes necessary to confer subject matter jurisdiction upon the North Dakota courts for actions arising in Indian country, and involving an Indian litigant. Judge Berning dismissed the case. The dismissal was without prejudice, and Three Tribes remained free to reinstitute its action upon compliance with applicable provisions of the Indian Civil Rights Act of 1968 (25 U.S.C. §§1301, et seq.), and Chapter 27-19, N.D.C.C. This decision was unanimously affirmed by the North Dakota Supreme Court. *Three Affiliated Tribes v. Wold Engineering, et al.*, 321 N.W.2d 510 (N.D. 1982).

Three Tribes petitioned this Court for review on Writ of Certiorari, and review was granted. After review, this Court determined that the North Dakota Supreme Court's decision rested upon a possible misapprehension of federal law. The decision was therefore vacated. This Court further decided, however, that justification for the decision may well be based upon adequate State law considerations not necessarily repugnant to the United States Constitution or existing Federal Indian Law. The case was remanded to the North Dakota Court with direction to make that determination. *Three Affiliated Tribes v. Wold Engineering, et al.*, ____ U.S. ____, 81 L.Ed.2d 113 (1984).

Pursuant to that directive, briefs were again accepted, an oral argument heard in the North Dakota Supreme Court. It then concluded that its earlier decision, while mistaken on federal grounds, was nonetheless justified by adequate state law reasons. The State Court's earlier decision was therefore modified to reflect this fact. The Court further concluded that tribal and individual Indian access to the State Court could be conditioned upon their acceptance, and compliance with North Dakota law as

found in Chapter 27-19, N.D.C.C. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985).

Three Tribes again petitioned this Court for review questioning whether the North Dakota jurisdictional bars violated the due process and equal protection clauses of the Constitution of the United States, and also whether the State could condition jurisdiction upon a tribal waiver of sovereign immunity. Petition for Writ of Certiorari, page i. This Court granted Writ of Certiorari on October 15, 1985.

The case now appears before this Court for decision.

VIII. SUMMARY OF THE ARGUMENT

A. Chapter 27-19, N.D.C.C., was enacted in response to the jurisdictional offer made in 67 Statutes 505, commonly known as P.L. 280. Prior to State action, the State's judiciary historically refrained from exercising subject matter jurisdiction over actions arising in Indian country, and involving an Indian litigant. This prohibition can be traced to the disclaimer required by the State's original Constitution, and the status of Federal Indian Law at the time that Constitution was drafted.

As a "disclaimer state" North Dakota's authority to assume subject matter jurisdiction in Indian country was found in Section 6 of P.L. 280. In accordance with that Section, the State amended its Constitution, and enacted legislation required to assume the jurisdiction offered. Once this occurred, the State became subject to the provisions found in Section 7 of P.L. 280. Having taken all steps required to obligate itself to an assumption of jurisdiction, North Dakota had done everything required to accept the jurisdictional offer. Chapter 27-19, N.D.C.C., is therefore

not affected by later Congressional acts which now govern the actions of other states in assuming jurisdiction over Indian country.

Chapter 27-19, N.D.C.C., offers all jurisdiction of the State courts to the Indian people upon their tribal, or individual acts of acceptance. The law further allows a retrocession of that same jurisdiction should the Indian people be dissatisfied with the State's judicial system. Until the Indians act, the State will refuse to entertain any jurisdiction over actions arising in Indian country and involving an Indian litigant.

A state bar to subject matter jurisdiction is not automatically impermissible if it rests on adequate state law reasons. Chapter 27-19, resulted from the give and take of the political process. The State sought the attainment of certain goals by the assumption of jurisdiction. The Indian people objected to those goals and attempted to stop the State action. A compromise was reached between the State, and the Indian people. The State Supreme Court has determined that by this compromise, as a matter of State law, the courts of this State have no subject matter jurisdiction over actions in Indian country and involving an Indian litigant.

This compromise approach was not specifically authorized by P.L. 280. On the other hand, it was not specifically forbidden. The State should not be criticized for acting in good faith to the offer made by P.L. 280, and at the same time trying to accommodate the wishes of the Indian people. Taking less than the jurisdiction offered is not forbidden, and negotiating the terms by which the jurisdiction is to be assumed is likewise not forbidden. If there is a problem with Chapter 27-19, N.D.C.C., the solution to this problem is not to be found in this Court.

That solution rests in the hands of the parties to the compromise—the State Legislature and the Indian people. The decision of the North Dakota Supreme Court ought be affirmed.

B. Chapter 27-19, N.D.C.C., does not violate due process considerations of the fourteenth amendment. Due process guarantees that all citizens shall enjoy those rights recognized by the Constitution as fundamental. Even fundamental rights are not absolute however and reasonable restrictions calculated to enhance perceived notions of fair play and substantial justice are not prohibited. Chapter 27-19, works toward a goal of fair play and justice.

Access to the courts of a state for redress of tort wrong is a right fundamentally guaranteed by the Constitution. This access is always conditional upon a party's willingness to comply with the reasonable rules of court, and upon substantive notions of fairness. Among the goals sought by Chapter 27-19, was a mechanism for the employment by the North Dakota courts of the State's rules of procedure, court, and evidence. It was believed prior to enactment, and is still maintained by Three Tribes today, that these State procedural rules have no place on the reservation, and cannot be imposed at the present time. Due process does not guarantee access to the courts by a party who refuses to, at a minimum, obey the same rules of procedure that all others must live by.

Other goals of Chapter 27-19, were the introduction on the reservation of a forum where contract, tort, and other actions could be fairly tried. The Legislature sought an opening of the courts for fair access to all in the trial of actions, consistent with traditional notions of fairness. A one-sided, uneven jurisdictional setting was never envisioned, and would not have survived a legislative process.

Access to courts may be conditioned upon the willingness of a party to play by all of the rules, not simply those rules which it finds convenient. Chapter 27-19, will impose this fairness upon the Indian people. The imposition does not violate due process, and the Court's decision ought be affirmed.

C. Chapter 27-19, N.D.C.C., does not violate the equal protection guaranteed by the 14th Amendment of the United States Constitution. The Congress has plenary power over the Indian people. In the exercise of this power, Congress may make rules and impose regulations which if made in other areas would be inherently suspect. Due to the unique relationship between the United States, and the Indian people these classifications are justifiable and survive Constitutional scrutiny. A state does not enjoy this same relationship with Indians, and so may not justify state classifications on the same grounds.

Chapter 27-19, is not just simply another State law, however. It was, instead, enacted in specific response to P.L. 280. Being within the scope of the jurisdictional offer made by that federal act, the State action is likewise justifiable as a political classification which can survive Constitutional scrutiny.

A legislative classification not inherently suspect need pass only minimal Constitutional scrutiny and satisfy only a rational basis test. Chapter 27-19, as a mechanism for the orderly assumption of State jurisdiction in Indian country will satisfy this test. Further, recognition of the jurisdictional void—the heart of the matter at hand—serves a legitimate purpose. P.L. 280, was designed to mainstream the Indian people into the non-Indian world. As initially drafted, Chapter 27-19, would have unilaterally and immediately accomplished this objective. The Indian

people objected, and in order to meet these objections a compromise was struck. As a political compromise, the State adopted the objections of the Indian people as its own, and the satisfaction of these objections became part of the purpose of the legislation. Satisfaction of the Indian objections, a legitimate State purpose, satisfies the rational basis test. Chapter 27-19, withstands Constitutional muster.

Chapter 27-19, as construed more fairly advances the goals of equal protection than the argument of Three Tribes, and its supporting *amici*. The goal of equal protection is to void legislative schemes which create, or continue a caste society where privileges are enjoyed on the basis of race or class. As North Dakota law now exists, no caste exists. When the Indian world and the non-Indian world interact under State law, both must realize they stand on equal footing before the State's courts. If Three Tribes' position is followed, the opposite results. The non-Indian world will deal at its peril with Indians on the reservation knowing the Indian people, being super plaintiffs, will enjoy all substantive remedies while the defendant will have none. The Indian super plaintiff will have the full benefit of all State rules of procedure, discovery, and process while the hapless non-Indian defendant will be denied even this protection. This sort of system is hardly in keeping with traditional equal protection notions, and must therefore fail entirely. The North Dakota decision must be affirmed.

D. Chapter 27-19, N.D.C.C., does not violate any traditional sovereign immunities enjoyed by the Indian tribes. It was never intended that Chapter 27-19 deny the Indian tribes those traditional immunities they, as domestic sovereign entities enjoy. However, the total immunity these

people once enjoyed has been greatly diminished, and when dealing with the non-Indian world, these broad immunities are of questionable viability. P.L. 280 is, itself, a law which had as its goal the significant reduction of traditional tribal powers, and a transfer of those traditional powers to the various states. Chapter 27-19, operates within the scope of that reduction.

Chapter 27-19, requires some relinquishment of immunity. Modern notions of sovereign immunity have directed sovereign powers to open themselves up to some actions, and stand as defendants before the courts. These other sovereigns have likewise recognized that in bringing suit they must agree to follow the rules of court. Three Tribes insists it need not even do this much. Faced with such a position, and with an insistence upon tribal power to initiate suit, the North Dakota court may justifiably refuse to allow any action at all.

The State law does not require Three Tribes to submit its powers or its property to State jurisdiction beyond that contemplated by the traditional federal or state laws. If either law recognizes the freedom from execution, levy and the like, then this immunity remains under the Court's reasoning. Further, the Chapter itself allows those traditional tribal customs and laws to continue without interruption. The Courts must recognize these tribal customs and traditions which make the Indian people unique in our society. The State Courts will be required to exercise great restraint in these areas and preserve tribal sovereign powers, even in those cases where non-compensatory relief, such as declaratory or injunctive remedies are sought. The moment a Court is asked to fashion relief it must first, and always, defer to the customs and traditions of the Indian people.

Chapter 27-19, will require reduction of the sovereign immunities enjoyed currently by the Indian people. This reduction was already envisioned by P.L. 280. The approach taken by the State law will allow only a minimal potential State intrusion. Those subject matter areas inherently, and traditionally Indian will remain so.

Chapter 27-19, was formed by a multi-party political compromise. It was created to satisfy State and tribal needs. As an acceptable compromise in 1963, it should continue and be given approval by this Court. If the Indian people are now dissatisfied with the law and with the compromise they should seek their remedy before the State Legislature, and not in this forum. The North Dakota decision ought to be affirmed.

IX. ARGUMENT

A. PRIOR TO THE ENACTMENT OF CHAPTER 27-19, N.D.C.C., NORTH DAKOTA EXERCISED NO SUBJECT MATTER JURISDICTION OVER ACTIONS ARISING IN INDIAN COUNTRY, AND INVOLVING AN INDIAN LITIGANT.

Section 4, Clause 2, 25 Statutes at Large, 676, also known as the Enabling Act of 1889, required North Dakota and four other states admitted to the Union to completely disclaim jurisdiction in Indian country. North Dakota, in its first Constitution, included language which made the required disclaimer. N.D. Const., Art. 16, Sec. 203 (Constitution of 1889). This Constitutional language paralleled the language of the Enabling Act. When this provision was placed in the North Dakota Constitution, Federal Indian law stating the jurisdictional status in Indian country

was best reflected by *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). This *Worcester* policy thereby became the policy of the State of North Dakota. *Three Affiliated Tribes v. Wold Engineering, et al.*, U.S., 81 L.Ed.2d 113, at 118 (1984).

While it may be true that historical disclaimers have infrequently been the sole basis for a Federal court decision, or Congressional action, *Arizona v. San Carlos Apache Tribe*, 463 U.S., 77 L.Ed.2d 837 (1983), the disclaimer might well form the core of a State decision. If the disclaimer is seen, as a matter of State law, to completely prohibit State jurisdiction in Indian country, then the State may refuse to take any jurisdiction in Indian country. State jurisdictional bars to actions in Indian country are not automatically prohibited, and may be justified by State law. *Arizona v. San Carlos Apache Tribe*, 463 U.S., at, 77 L.Ed.2d 837 (1983); *Three Affiliated Tribes v. Wold Engineering, et al.*, 81 L.Ed.2d 113, at 124.

Regardless of any decision reached by the North Dakota Supreme Court in *Vermillion v. Spotted Elk*, 85 N.W. 2d 342 (N.D. 1957), the jurisdictional status of North Dakota over Indian country was, as a matter of State Constitutional law, reflected by *Worcester*. That Constitution must be understood, as a matter of North Dakota law, in the sense most obvious to the drafters. *Daly v. Beery*, 45 N.D. 287, 178 N.W. 104, at 114 (1920) (Christianson, C.J., specially concurring). Once this intent is found, it becomes a mandatory rule of law in North Dakota. N.D. Const., Art. 1, Sec. 23. Any action by the State courts to fashion law contrary to the common understanding of the Constitution, and the plain meaning of that Constitution is a nullity, and is under North Dakota law, no law at all.

State v. Olson, 44 N.D. 614, 176 N.W. 528, at 538 (1920) (Christianson, C.J., specially concurring).

With this State law in mind, it is clear that notwithstanding this Court's prior interpretation of *Vermillion v. Spotted Elk*, 85 N.W.2d 342 (N.D. 1957), at least as a matter of State law, the State of North Dakota had no subject matter jurisdiction in Indian country prior to the amendment of its Constitution and the removal of its Constitutional disclaimer.

B. P.L. 280 OFFERED NORTH DAKOTA AN OPPORTUNITY TO TAKE FULL JURISDICTIONAL RESPONSIBILITY OVER INDIAN COUNTRY.

505 U.S. Statutes at Large 67, commonly known as Public Law 280, is the high point of assimilationist policy designed to provide omnibus transfer of Federal responsibility for jurisdiction in Indian matters to the various states. *Washington v. Yakima Indian Nation*, 439 U.S. 463, at 488 (1979). Under P.L. 280, North Dakota, a "disclaimer state" could assume subject matter jurisdiction in Indian country only after it complied with Section 6 of the Act and amended its Constitution. Further, Section 6 required the State to enact legislation deemed necessary to assume the jurisdiction. Section 6 of P.L. 280 is viewed as primarily a procedural section, offering little substantive guidance for the states. *Washington v. Yakima Indian Nation*, 439 U.S. at 485. Substantively, however, once a Section 6 disclaimer state complies with that Section, it may then be viewed as though it were a Section 7 state—an "option state" *Washington v. Yakima Indian Nation*, 439 U.S. at 495. North Dakota amended its Constitution in 1957 to remove the federally imposed disclaimer language. In 1963, the second Section 6 step was accom-

plished by enacting Chapter 27-19, N.D.C.C. Once this occurred, North Dakota had done all it needed to do to take the jurisdiction offered. North Dakota became then a Section 7 state, and should now be viewed as an option state.

Once the State has taken the appropriate legislative action necessary to comply with P.L. 280, its jurisdictional assumption is complete, and is automatic. With the assumption complete, later Federal enactments dealing with Indian country have no effect. Any jurisdiction taken pursuant to Section 7 of P.L. 280, and prior to the enactment of 25 U.S.C. Section 1323, will stand independent of the later Federal enactments. 25 U.S.C. §1323(b).

Chapter 27-19, is an affirmative State act designed to, in a permissible fashion, assume all jurisdiction in Indian country. An assumption is conditional upon tribal or individual acceptance. This conditional jurisdictional approach is not forbidden by P.L. 280. *Washington v. Yakima Indian Nation*, 439 U.S. at 499. As this Court noted in *Yakima*, jurisdiction could be assumed subject at a time, reservation at a time, or even different areas of Indian country at a time. *Ibid.*, 494, footnote 41. North Dakota has left these doors open, with one further proviso, that is, it will even assume jurisdiction over individual Indians one at a time if desired by that individual. Section 27-19-05, N.D.C.C.

Not only may the Indian people choose from a variety of options under the State law, should they feel dissatisfied they may collectively, or individually withdraw their consent. Section 27-19-13, N.D.C.C. As is stated in *Yakima*, it is hard to envision why a state, such as North Dakota, which could have unilaterally taken 100 percent

of the jurisdiction offered should be criticized or penalized for taking a less intrusive jurisdictional posture.

In *Yakima* this Court concluded:

The State of Washington in 1963 could have unilaterally extended full jurisdiction over crimes and civil causes of action in the entire Yakima Reservation without violating the terms of Pub L 280. We are unable to conclude that the State, in asserting a less intrusive presence on the Reservation while at the same time obligating itself to assume full jurisdictional responsibility upon request, somehow flouted the will of Congress. A State that has accepted the jurisdictional offer in Pub L 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. For Congress surely did not deny an option State the power to condition its offer of full jurisdiction on tribal consent.

Ibid., at 499.

North Dakota has accepted the jurisdictional offer of P.L. 280, and has left room for substantial tribal self-government. The North Dakota response to P.L. 280 was complete in 1963, and should not be disturbed now.

C. AS A MATTER OF NORTH DAKOTA LAW, THE COMPROMISE REACHED BETWEEN THE STATE, AND THE INDIAN PEOPLE PRIOR TO ENACTMENT OF CHAPTER 27-19, N.D.C.C., TERMINATED ANY RESIDUAL, OR PREEXISTENT SUBJECT MATTER JURISDICTION IF EVER ANY SUCH JURISDICTION COULD HAVE BEEN EXERCISED BY THE STATE COURTS.

On remand, this Court directed the North Dakota Court to determine whether State law would require the North Dakota Courts to forego the jurisdiction recognized in *Vermillion*. *Three Affiliated Tribes v. Wold Engineering, et al.*, U.S., 81 L.Ed.2d at 124. Notwithstanding the fact that the *Vermillion* type jurisdiction is of questionable State Constitutional viability and may be incorrect under any circumstances, the North Dakota Supreme Court has determined that, as a matter of State law, Chapter 27-19, N.D.C.C., constitutes a complete disclaimer of jurisdiction in Indian country, and terminated any residual or preexistent jurisdiction, if ever such jurisdiction previously existed. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d at 104.

As the North Dakota Court noted, Chapter 27-19, was initially proposed as a unilateral State assumption of total jurisdiction over all actions in Indian country. *Ibid.* 102. Prior to legislative action, however, various research committees met with the Indian people, and others living on or near the reservations in North Dakota. Later, the State Legislature called for hearings, and invited Indian tribal chairmen and spokesmen to appear before a State Senate and House Committee. At the hearings, tribal leaders, and tribal attorneys appeared before the Committees and voiced strong opposition to the plan as pro-

posed. *Ibid.* 103, see footnote 7. They asked for an all, or nothing at all jurisdictional setting, and for a delay in any assumption of jurisdiction until the Indian people asked for it. In fact, during argument on remand, the Honorable Justice Paul Sand recalled how strenuous these Indian objections were. He recalled how the Indians appeared in Capitol Building's Memorial Hall, and beat drums and paraded in protest to the proposed jurisdictional plan. This, Justice Sand believed, was strong indication of Indian opposition to the plan.

The unilateral jurisdiction proposed would have, the Legislature believed, accomplished eleven goals. Among those goals were: goal eight, enforcement of contracts; goal nine, providing a tribunal for tort actions; goal ten, permitting service of process; and goal eleven, goals too numerous to mention. *Ibid.*, at 102, footnote 5. Given the strength of the Indian protests, and the considerations given to those protests, the North Dakota Legislature, and the State's Supreme Court, could justifiably conclude that none of these goals would be reached until the Indian people requested jurisdiction. No exceptions were asked for by the tribal spokesmen. They did not ask that *Vermillion* continue as good law. Nor did they ask the Legislature to allow "residual jurisdiction" to continue. In fact, when presented with the choice of unilaterally assuming all jurisdiction, or allowing a jurisdiction to continue by which one group of litigants could enjoy all the benefits of Court as plaintiffs, but never have to appear as defendants, it is doubtful any Legislature would allow the second jurisdictional scheme mentioned to continue. The only reasonable conclusion from the history of Chapter 27-19, and the conclusion reached by the North Dakota Court is, that no jurisdiction at all would be exercised after Chapter 27-19, was amended and enacted. This is

not the first time this conclusion was reached by a North Dakota Supreme Court. In an opinion nearly contemporaneous with the passage of Chapter 27-19, the North Dakota Court concluded the legislation completely disclaimed all jurisdiction in Indian country. *In re Whiteshield*, 124 N.W.2d 694 (N.D. 1963). In that case, a juvenile proceeding was started in State district court. The juvenile was an Indian, and an enrolled member of the Devils Lake Sioux tribe. The action began in 1962, prior to passage of Chapter 27-19. In 1962, this "residual" jurisdiction was apparently exercised by the North Dakota courts. It would be, therefore, similar to the *Vermillion* jurisdiction so strongly urged by Three Tribes now.

The North Dakota Court in *Whiteshield* concluded that Chapter 27-19, completely disclaimed all jurisdiction in Indian country. This decision, coming only four and one half months after Chapter 27-19, became law indicated how clearly the North Dakota Court has construed, as a matter of State law, the Chapter. And, since in that case the party which must have raised the jurisdictional issue, and which must have argued for the disclaimer was the respondent, the Indian litigant, it is clear that the Indian people themselves must have considered the Chapter to be a complete and total disclaimer of all preexisting, or residual jurisdiction.

The objections of the Indian people were heeded by the North Dakota Legislature. As a result of these objections, the State Legislature, and the Indian people worked out a compromise jurisdictional approach. The North Dakota Supreme Court has determined, that as a matter of State law, this compromise requires the courts of North Dakota to refuse any subject matter jurisdiction until the Indian people themselves ask for it, and that the

compromise terminated all *Vermillion* type jurisdiction. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 98 (N.D. 1985).

A compromise jurisdictional approach was not specifically authorized by P.L. 280. Yet, a compromise was not specifically forbidden. P.L. 280 may, at times be vague, and as such should be construed in a light most favorable to the Indian people. *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164 (1973). This rule of interpretation should not give way to a rule of reason which would take into consideration the history and background of the act, and the political processes behind the end result. Statutory provisions which are not clear on their face may be clear from the surrounding circumstances and legislative history. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 at 208, footnote 17 (1978).

The history and background of P.L. 280 is clear. The act was designed to transmit jurisdiction to the states. A state, like North Dakota, which has affirmatively obligated itself to fully undertake the offer made by P.L. 280 should not be criticized, or penalized for responding to this Congressional offer.

The North Dakota Supreme Court has concluded the history behind Chapter 27-19, reveals a State history of accommodation of the desires of the Indian people. North Dakota was not required to listen to the Indian voices raised in protest to unilateral State assumption of jurisdiction. It nonetheless chose to heed those voices. Those voices stated that State jurisdiction in Indian country was an all, or nothing at all proposition. Further, the Indian people wanted no State intrusion within their country until sought by the Indian people. Considering these voices, and their cry for a "hands off" jurisdictional setting,

the North Dakota Court's interpretation of Chapter 27-19 can hardly be faulted. The Indian people wanted nothing from the State, and asked the State Legislature to leave the reservations completely free of State court control. Given this history and background, the North Dakota court's decision is not surprising. It is completely justifiable as the price for the compromise reached by the State of North Dakota, and the Indian people in response to P.L. 280. And, as a matter of State law, that Court may justly conclude that the Legislature fully meant to terminate all jurisdiction.

In response to P.L. 280, the Indian people, and the North Dakota Legislature reached a political compromise. The compromise, a compact between the State and the Indian people, is perhaps not perfect and not in keeping with what the Indian people see as the perfect Indian jurisdictional environment. If they have an objection at this time, however, that objection is best met not in this Court, but in the State Legislature. The State stands ready to take the jurisdiction made available by P.L. 280. It has satisfied all requirements of P.L. 280. It is now up to the Indian people, who have asked for and received an all or nothing at all jurisdictional setting, to either accept this jurisdiction, or attempt to hammer out a new compromise. The Courts should not interfere with this political process, and should leave the parties in the posture they agreed would exist in the 1963 compromise.

D. CHAPTER 27-19, N.D.C.C., WAS ENACTED PURSUANT TO P.L. 280, AND REFLECTS THE POLITICAL COMPROMISE REACHED BETWEEN THE INDIAN PEOPLE, AND THE STATE OF NORTH DAKOTA. AS A COMPROMISE, IT DOES NOT VIOLATE DUE PROCESS CONSIDERATIONS OF THE FOURTEENTH AMENDMENT.

The due process clause of the Fourteenth Amendment to the United States Constitution guarantees all citizens that rights recognized by a free society as fundamental will not be arbitrarily and capriciously denied. Among the rights recognized as fundamental is the right to petition an impartial tribunal for redress of wrongs. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The right of access is believed to be preservative of all other rights, for without it, the only alternative is to violence. *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142 (1907).

Even fundamental rights are not, however, absolute. Due process guarantees those rights which are held fair by a free society, and which work toward the goal of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In a judicial context, this means that defendants shall not be faced with a jurisdictional setting which is totally hostile, and in which they will have no adequate way to prepare a defense. In North Dakota, the Supreme Court has ruled that the State's Courts shall afford all litigants a free and reasonable access to the courts and to the privileges accorded by those courts. *Malin v. LaMoure County*, 27 N.D. 140, 145 N.W. 582 (1914). It has further noted:

Every litigant is entitled to a 'fair trial' that is, a trial, open, impartial, and in due accordance with es-

established law and rule. The term implies free and ample opportunity for a litigant to present his case as he desires, before an impartial tribunal and under the rules of law or of the court which secure to the litigant a right to have his witnesses present and to be represented by counsel, if he desires. If the litigant has this opportunity he has had a fair trial. *Felix v. Lehman*, 74 N.D. 125, 20 N.W.2d 82, 86 (1945).

The current jurisdictional setting found in Chapter 27-19, and the North Dakota Court's decision in this case advances these goals. It insures that any trial held will be in accordance with traditional notions of fairness, that is, in a judicial system where all will be treated equally. Notwithstanding any arguments made by Three Tribes, and the various *amici* supporting it, the fact remains that what the Petitioners seek is "... to enjoy the full benefits of state courts as plaintiffs without ever running the risk of appearing as defendants." *Three Affiliated Tribes v. Wold Engineering, et al.*, U.S., 81 L.Ed.2d 113, at 133 (1984) (Rehnquist, J. dissenting).

Chapter 27-19, N.D.C.C., prevents this injustice from occurring.

A right of access is further conditional upon a party's manifested willingness to obey reasonable rules of court. A party's refusal to obey such reasonable procedural or substantive rules should not be tolerated. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). A situation where one party would clearly have all of the mechanisms for discovery, and other processes available, while at the same time those same rules would be denied an adversary is clearly contrary to any reasonable due process analysis, and contrary to traditional rights of fair access to the courts.

The goals sought by the State in enacting Chapter 27-19, was the implementation upon the reservation of State rules of process, and procedure. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 102, footnote 5. Chapter 27-19, was viewed by the State Legislature as necessary to achieve this goal. Indeed it was maintained by counsel for Three Tribes below that the State's rules for the compulsory attendance of witnesses are without any force or effect in Indian country. If this reasonable rule of Court is without force on the Indian Reservation, it follows that the Indian litigant may raise objections to all other reasonable Rules of Court or procedure if the rule is inconvenient to the Indian litigant. Thus, not only will Wold Engineering be denied reasonable substantive rights and remedies, even those rules of reasonable procedure, discovery, and subpoena will be withheld from it under the Three Tribes jurisdictional approach.

Failure of Three Tribes to admit to even this limited State Court jurisdiction for the purposes of bringing about the usual course of discovery and proceedings will deny Wold Engineering due process.

Three Tribes seeks access to the North Dakota Courts in a fashion which is totally foreign to notions of fair play and substantial justice. Three Tribes' proposed jurisdictional setting will allow Indian people the full range of judicial remedy, while according others none. To compound this injustice, not only will the non-Indian litigant have no reciprocal substantive remedies, the Indian litigant will have available all rules of procedure, while the hapless non-Indian defendant will have no process or rules protecting him. This one-sided inquisition is destructive of any fairness, and was never envisioned by the compromise which brought about Chapter 27-19.

The compromise sought by the Indian people was an all, or nothing at all setting. They sought a total removal of any State Court authority, including the State Court's authority to force compliance with reasonable rules of Court and procedure. Having reviewed what was asked for, the jurisdictional setting should not run afoul of any due process consideration.

Chapter 27-19, will ensure that all litigants must use the available forums in a reasonable and fair fashion, allowing all litigants access to procedural and substantive rights. So long as this traditional fairness is achieved, due process is satisfied. Forcing the Indian litigant to recognize and agree to this fairness does not violate due process. The decision of the North Dakota Supreme Court will satisfy traditional due process fairness, and ought therefore be affirmed.

E. A STATE LEGISLATIVE CLASSIFICATION BASED UPON A SPECIFIC FEDERAL AUTHORITY DOES NOT VIOLATE EQUAL PROTECTION OF THE LAWS PROVIDED THAT CLASSIFICATION SERVES TO ACCOMPLISH A LEGITIMATE STATE PURPOSE.

The State's obligations under the 14th Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due. *Boddie v. Connecticut*, 401 U.S. 371, at 380 (1971).

The equal protection urged by Three Tribes in this case is that it be allowed to sue a non-Indian litigant in State Court. At the same time, Wold Engineering, a non-Indian litigant, which has asserted its counterclaim against

Three Tribes, will be denied protection in that same forum for resolution of issues which arose in the same transaction. Regardless of the verbal camouflage, this is the position advanced by counsel for Three Tribes in its argument to the North Dakota Supreme Court, and which is reasserted in its argument in this Court. The protection afforded by such a society which would allow this to occur is obvious, but is hardly equal, and it is not in keeping with the values held by our free society.

Three Tribes argues that the effect of the North Dakota decision, and of Chapter 27-19, is the creation of an inherently suspect racial classification which denies to Indian litigants their fundamental rights of access to the court.

Indians on their reservations reside in a unique political environment. Residing in this unique political environment they are not people similarly circumstanced as all other citizens. The Indian world, being different in fact, may be treated in law as though it were different. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). The Constitution does not require those things which are different in fact or opinion to be treated in law as though they were the same. *Tigner v. Texas*, 310 U.S. 141 (1940).

From the very outset of this Nation's history, the Indian world has been treated in law as though it were different from the non-Indian world. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The determination that the Indian world is different has been made in the Constitution. United States Constitution, Art. I, Sec. 8, Clause 3. The Congress, and the State Legislature acting in response to Congressional mandates, should be given substantial latitude to establish the classifications that roughly approximate the nature of the problems perceived by Con-

gress, the States, and the Indian people and to accommodate the interests of all involved. North Dakota's legislative response to the jurisdictional problems it faced in relation to the unique Indian environment present within its borders was to enact a plan which approximated the nature of the problems perceived by both the State, and the Indian tribes. This accommodation was not prohibited by P.L. 280.

The unique legal status of the Indian tribes under Federal law permits Federal legislation which would single Indian tribes out for special treatment. That Indians while on their reservations have a different standing under the law is deemed to be politically based and is therefore not constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535 (1974). Under this unique legal status, Indians have a different standing than non-Indians for purposes of jurisdiction. This jurisdictionally different status may result in the denial of a forum to Indian litigants which is otherwise available to non-Indian litigants. This is to be expected and is not Constitutionally offensive. *Fisher v. District Court*, 424 U.S. 382 (1976).

Three Tribes argues the State action which singled Indians out for special treatment violates the Constitutional guarantees of equal protection. This Court has held, however:

It is settled that the 'unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*, 417 US 535, 551-552, 41 L Ed 2d 290, 94 S Ct 2474. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted

in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub L 280. And many of the classifications made by Chapter 36 are also made by Pub L 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, e.g., *United States v. McBratney*, 104 US 621, 26 L Ed 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. See, e.g., *United States v. Wheeler*, 435 US 313, 55 L Ed 2d 303, 98 S Ct 1079. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power. *Washington v. Yakima Indian Nation*, 439 U.S. at 500-501.

North Dakota, like Washington, does not enjoy the same unique relationship with the Indian tribes as does the Federal Government. However, Chapter 27-19, North Dakota's legislative response to P.L. 280, is not simply another State law. Like Washington's Chapter 36, Chapter 27-19, was enacted in response to a Federal measure designed to readjust the allocation of jurisdiction over Indian country. The North Dakota law creates the obligation of the State to accept responsibility for this jurisdictional allocation, and places the burden upon the Indian tribes to make effective that allocation. Section 27-19-02, N.D.C.C. If P.L.

280 does not abridge a fundamental right, and North Dakota, as Washington, acted under the explicit authority granted by Congress, the action of the State is not constitutionally impermissible and does not create an inherently suspect racial classification. No fundamental rights have been abridged. Three Tribes' argument is untenable since the State only acted in accordance with the specific classifications allowed by Congress under P.L. 280.

This Court, in applying equal protection analysis to permissible State classifications not inherently suspect, need only seek assurance that the action bear a fair relationship to a legitimate public purpose. This standard has been referred to as the rational basis standard. *Dandridge v. Williams*, 397 U.S. 471 (1970). Here, such a fair relationship exists, and the Indian tribes received precisely the jurisdictional protections they requested. Three Tribes argues that somehow the North Dakota legislative blueprint and judicial decisions work to harm them, a discreet and insular minority, and so must advance a compelling interest, or at least a heightened interest. But, the North Dakota decision is not racially motivated. The decision reflects merely the actual political differences presented. The reflection is not constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535 (1974). Further, the legislation is not designed to disadvantage the Indian tribes. Rather, the legislation was passed in direct response to Congressional mandates of P.L. 280, and to the requests made by the Indian tribes that this State assume no jurisdiction within their lands. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d 103, footnote 7.

The North Dakota legislation advances a legitimate public purpose, and was designed to accommodate Indian needs and requests. The final draft of Chapter 27-19,

resulted from a political compromise. By this compromise, the State of North Dakota attempted to accommodate and satisfy the objections of the Indian people. By undertaking this obligation, the State, in essence, adopted these objections as its own purpose. The objections and purposes of the Indian people, become the objections and purposes of the State of North Dakota. Coming, as they do, from the Indian people, the accommodation reached by Chapter 27-19, advances a legitimate State purpose. That legitimate State purpose is the satisfaction of the Indian objections, while at the same time properly responding to Congress's offer in P.L. 280.

The equal protection clause, in relation to rights of access to courts, guarantees the right of parties to a meaningful opportunity to be heard within the limits of practicality. The clause guards against particular laws which may jeopardize this right. *Boddie*, 401 U.S. at 380-381.

An opportunity to be heard within meaningful limits of practicality has not been denied Three Tribes. A condition has been placed upon it. That condition is that the Indian tribes seek and accept the jurisdiction offered by the State so that all State citizens stand on equal footing in their State Courts. Section 27-19-02, N.D.C.C. Once the condition is met, all meaningful opportunities to be heard within the limits of practicality will be granted. There is no particular State created barrier which jeopardizes this right. The only barrier existing rests with Three Tribes itself which wishes to stay free of State court as a defendant, but which also wishes to use the State courts when, as a plaintiff, it will suit its purpose.

Three Tribes' argument is similar to that advanced by the criminal defendant in the case of *United States v. Antelope*, 430 U.S. 641 (1977). In that case, the defendant

argued that Idaho State law, which would require a different proof to achieve conviction and would therefore result in a more lenient sentence, should be the law under which he was to be charged. Federal law imposed a harsher sentence for his on reservation activities. This Court noted the obvious fallacy of this argument and, in footnote 13, at 430 U.S. 650, stated: "The Constitution does not authorize this kind of gamesmanship."

Three Tribes, like the *Antelope* defendant, argues it has the power to pick the forum which would allow it the most favorable jurisdictional status. At the same time, Three Tribes insists upon the retention of its protected status in order to deny all others the equal right to bring Three Tribes into the same forum as the defendant. Such gamesmanship is totally unjustifiable.

The jurisdictional setting sought by Three Tribes further violates the purposes of equal protection. The purpose of equal protection is to abolish all legislative classifications which create or continue a caste-based society, and which would give special privileges on the basis of race or class. *Plyer v. Doe*, 457 U.S. 202, at 213 (1982). Chapter 27-19, confers no special privilege, and creates no caste. Under it, the Indian and non-Indian world interact on equal footing before the State's courts. The argument of Three Tribes, and its *amici* in support, seek the opposite result. By it, non-Indians will deal at their peril with the Indian people knowing that as super plaintiffs, the Indian people will be able to enjoy all substantive remedies, while the non-Indian defendant will enjoy none. Not only this, the Indian super plaintiff will have the full panoply of all State rules of procedure, discovery, and process, while the hapless non-Indian defendant will be denied even this minimal protection. This sort of

system is hardly in keeping with traditional notions of equal protection, and deny fair play and substantial justice to the non-Indian defendants. Chapter 27-19 is fully in keeping with the wishes of the Indian people, and is within the acceptable range of State action authorized by P.L. 280. The decision of the North Dakota Supreme Court ought to be affirmed.

F. CHAPTER 27-19, N.D.C.C., WILL NOT INFRINGE UPON TRIBAL SOVEREIGN IMMUNITY TO AN EXTENT NOT ENVISIONED BY P.L. 280.

Chapter 27-19, N.D.C.C., was enacted pursuant to P.L. 280. Once the State responded to the jurisdictional offer made by affirmatively obligating itself to undertake the subject matter jurisdiction in Indian country offered by P.L. 280, it had done all that was required by P.L. 280. *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). Later Federal enactments did not change this State act, nor will it preempt any jurisdiction assumed under P.L. 280. In fact, if a complying Section 6 state, like North Dakota, becomes a Section 7 state for purpose of P.L. 280 as is suggested by this Court in the *Washington v. Yakima Indian Nation* case, then it is clear that Chapter 27-19, and its jurisdictional plan is not affected by later amendments to P.L. 280. 25 U.S.C. §1322(b).

P.L. 280 was designed to transfer all subject matter jurisdiction to the State courts. Even assuming this law is ambiguous, and those ambiguities should be construed in favor of the Indian tribes, *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164 (1973), surrounding circumstances and Congressional intention clearly ascertainable may nonetheless require construction contrary to what the Indian people may argue is in their best interests. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978),

footnote 17. P.L. 280 is not ambiguous if those circumstances are reviewed. It was clearly an attempt by Congress to terminate Federal responsibility and to assimilate the Indian people into the non-Indian world.

P.L. 280, when read in light of this Congressional intent would require a significant reduction of tribal sovereignty. Chapter 27-19, does not go beyond the scope of the jurisdiction offered in P.L. 280, and to the extent that it obligates the State to take jurisdiction up to the amount offered by P.L. 280, the State required waiver of immunity is permissible under the Federal law.

Chapter 27-19, N.D.C.C., at a minimum requires all litigants, Three Tribes included, to abide by the substantive rules and procedures of North Dakota Courts. Sovereign immunity has fallen in some discredit in recent years, and many sovereigns have opened themselves up to suit. Prosser, *Law of Torts*, 4th Ed., §131. The United States has waived tort immunity in limited instances by the Federal Tort Claims Act. North Dakota has opened itself up to contract actions, §32-12-02, N.D.C.C., and has authorized a waiver of sovereign immunity to the limits of insurance policies purchased by its various State agencies. §32-12-1-15, N.D.C.C. The result of these actions is an exposure of the sovereign to liability for damages.

Chapter 27-19, Three Tribes argues, impermissibly requires Three Tribes to face a contract or tort claim. The North Dakota Supreme Court suggests this outcome in its decision. The decision also recognizes, however, that exposure for liability may only be imposed against an Indian tribe by levy and execution against tribal property to the extent it may be appropriate under State or Federal law. *Three Affiliated Tribes v. Wold Engineering, et al.*, 364 N.W.2d at 104. P.L. 280, and the Federal case

law would seemingly exempt all tribal property from execution and levy. See, *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940). Being exempt from execution and levy, Three Tribes' assets are not exposed. As a practical matter then, without any exposure for liability, any forced waiver from a tort or contract suit by Chapter 27-19, is meaningless. No liability immunity has been taken away, and if any form of sovereign immunity has been removed, it is only as is allowed by P.L. 280.

Three Tribes argues it may be forced to face declaratory and other equitable types of actions if it is to consent to the subject matter jurisdiction of the State. This it claims will greatly infringe upon the Tribes' inherent power to make its own laws and be governed by them. This argument ignores Section 27-19-09, N.D.C.C. That Section provides:

27-19-09. Tribal ordinances and customs preserved.—

Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community, in the exercise of any authority which it may possess shall, if not inconsistent with the applicable civil law of this state, be given full force and effect in the determination of civil causes of action pursuant to this section.

This Section will accord Three Tribes with protection from the feared interference. Indian custom and tradition, those rules by which the Indian people govern themselves, will be given due deference by the State's Courts. Thus, in matters inherently Indian in nature, and in which the Indian people have long exercised traditional control, the State must not interfere. Tribal elections, tribal meetings, determinations of tribal status, and the

like will not be subjected to State Court control. Those practices which make the Indian people distinct and unique will not be curtailed. Their sovereignty remains intact under the State plan.

Three Tribes will be subject only to those State declaratory and equitable remedies which would arise when it deals with non-Indians outside of the reservation and in non-tribal matters. And, even in these limited instances, the State may refuse to impose a rule of law, or a remedy which is not recognized or practiced by the Indian people. Section 27-19-09, N.D.C.C.

In one significant aspect, Chapter 27-19, will require a relinquishment of immunity. It was argued by Three Tribes in the North Dakota Court that it cannot be compelled by State Court processes and rules of Court. A non-Indian litigant will have no right to serve process, compel discovery, or compel attendance of witnesses in actions that Three Tribes might bring. Sovereign immunity has never extended this far, and other sovereigns have recognized that in bringing suit, they must follow the reasonable rules of Court. Faced with this argument by Three Tribes, the North Dakota Supreme Court's decision to refuse to allow any action at all by Three Tribes is understandable. A court should not be required to hear actions in which its reasonable rules, orders, and procedures may be completely ignored by the plaintiff. The North Dakota Supreme Court has imposed its rules upon the State of North Dakota itself when that entity brings an action. *State ex rel. Olson v. Nelson*, 222 N.W.2d 383 (N.D. 1974).

If Three Tribes seeks to bring an action, it must consent to the procedures of that Court, and waive its sovereign immunity at least to the extent that it will agree to obey the rules of the courts of North Dakota.

Chapter 27-19, consistent with the mandates of P.L. 280, requires the Indians to forego some of their immunities currently enjoyed. None of these immunities will be waived until the Indian people themselves seek that waiver. And, even when this subject matter jurisdiction is taken, and immunity is waived, those traditional customs and immunities enjoyed by the Indian people will nonetheless remain intact, and respected by the North Dakota courts. The Indian people are asked to give up little to receive the full protections of the North Dakota courts. The State of North Dakota does not force this relinquishment upon the Indians, rather it has left this relinquishment up to the Indian people as a matter for their own self determination. This self determination resulted from Indian requests. Chapter 27-19, does not force the Indian tribes to waive immunity beyond that contemplated by P.L. 280, or beyond that requested by the Indian people themselves. The decision of the North Dakota Supreme Court which requires a waiver of immunity within the scope contemplated by Federal law, and State law should therefore be allowed.

X. CONCLUSION

For the reasons stated herein, Wold Engineering respectfully requests the decision of the North Dakota Supreme Court be affirmed.

Respectfully submitted this 7th day of January, 1986.

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APPENDIX

Public Law 280

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows: §1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

A2

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

A3

1360. State civil jurisdiction in actions to which Indians are parties.

SEC. 4. Title 28, United States Code, is hereby amended by inserting in Chapter 85 thereof immediately after section 1359 a new section to be designated as section 1360, as follows:

§1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property,

including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this action.

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat 705, ch 604) is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

AMICUS CURIAE

BRIEF

MOTION FILED
DEC - 9 1985

⑤
No. 84-1973

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,
v.

WOLD ENGINEERING, P.C., *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of North Dakota

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
STANDING ROCK SIOUX TRIBE AND
DEVILS LAKE SIOUX TRIBE AS *AMICI CURIAE*

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IN THE
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THREE AFFILIATED TRIBES OF THE
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STANDING ROCK SIOUX TRIBE AND
DEVILS LAKE SIOUX TRIBE AS *AMICI CURIAE***

Pursuant to Supreme Court Rule 36.3, the Standing Rock Sioux Tribe and the Devils Lake Sioux Tribe move the Court for leave to file the attached brief *amici curiae* in support of the petitioner in the above-captioned case. *Amici* requested the parties to consent to the filing of this brief. Petitioner Three Affiliated Tribes has consented, but respondent Wold Engineering has refused to consent.*

* Respondent also refused to consent to the filing of an *amicus* brief by the Standing Rock Sioux Tribe the last time this case was before this Court, and indeed, opposed the Tribe's motion for leave to file the brief. Leave was nevertheless granted by the Court. 463 U.S. 1248 (1983).

Amici are federally recognized Indian tribes with established, well-organized tribal governments, including tribal court systems. Both have a direct interest in the outcome of the case since both are North Dakota tribes, and affirmance of the decision below would close state court doors to suits by *amici* and their members. The tribes are interested, both as entities which may seek access to state courts, and as governments concerned for the well being of their members who may need to sue in state courts, in assuring that Indians are not denied access to those courts. They also have an interest in seeing that the proper balance is struck between state jurisdiction and protection of the jurisdiction and role of the tribal courts. The Standing Rock Sioux Tribe participated as *amicus* in this Court's earlier consideration of this case. *Three Affiliated Tribes v. Wold Engineering, P.C.*, — U.S. —, 81 L.Ed.2d 113 (1984).

Amici respectfully request that their motion for leave to file the attached brief *amici curiae* be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1973

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,

Petitioner,

v.

WOLD ENGINEERING, P.C., *et al.*,

Respondents.

On Writ of Certiorari to the
Supreme Court of North Dakota

**BRIEF OF STANDING ROCK SIOUX TRIBE AND
DEVILS LAKE SIOUX TRIBE AS *AMICI CURIAE***

INTEREST OF AMICI

Amici are federally recognized Indian tribes with established, well-organized tribal governments, including tribal court systems. Both have a direct interest in the outcome of the case since both are North Dakota tribes, and affirmance of the decision below would close state court doors to suits by *amici* and their members. The tribes are interested, both as entities which may seek access to state courts, and as governments concerned for the well being of their members who may need to sue

in state courts, in assuring that Indians are not denied access to those courts. They also have an interest in seeing that the proper balance is struck between state jurisdiction, and protection of the jurisdiction and role of their tribal courts.

SUMMARY OF ARGUMENT

Chapter 27-19 of the North Dakota Code, as construed by the Supreme Court of North Dakota, closes the state courts to suits by Indian plaintiffs unless they consent to state jurisdiction over their reservations and waive tribal sovereign immunity from suit. This state policy, in effect, coerces tribes to surrender their sovereignty in order to gain access to state courts. It is directly contrary to the strong federal policy of protecting and promoting tribal sovereignty and self-government. Because the state pursues a goal which is not legitimate, and which is outweighed by the federal and tribal interests in tribal self-government, Chapter 27-19 is pre-empted by federal Indian law.

In addition, Chapter 27-19 is unconstitutional. The statute is subject to strict equal protection scrutiny both because it makes a racial classification and because it impinges upon a fundamental right. Chapter 27-19 closes state court doors to Indians, and only to Indians. This classification is not permissible under *Morton v. Mancari*, 417 U.S. 535 (1974), because it is not authorized by federal law. Chapter 27-19 also impinges upon the fundamental right of access to the courts. Since Chapter 27-19, as construed by the North Dakota Supreme Court, is not necessary to any compelling state interest, and indeed is intended to promote a state purpose contrary to federal Indian law and policy, it cannot survive strict scrutiny.

Furthermore, Chapter 27-19 violates due process because it denies the Tribes access to the state courts. It is not a substantive rule of law or a mere procedural

requirement; rather it denies Indians *any* opportunity to bring suit as a plaintiff in state court unless they first surrender valuable rights protected by federal law and policy. It closes to Indians the doors of the one court which is always an appropriate forum—the defendant's own court.

ARGUMENT

This Court is now squarely presented with the question it did not decide the last time this case was before the Court: whether a state law closing state courts to suits by Indian plaintiffs is consistent with the federal constitution and federal Indian law.

In the Court's prior consideration of this case, it held that federal law neither requires nor authorizes the closing of state courts to Indian plaintiffs. *Three Affiliated Tribes v. Wold Engineering, P.C.*, — U.S. —, —, 81 L.Ed.2d 113, 122-24 (1984) (*Wold I*). This Court also held that state court jurisdiction over this case does not interfere with tribal self-government. *Id.* at 121-22. The Court did not reach the constitutional issues which would be presented by a door closing statute, instead remanding the case to the North Dakota Supreme Court so that court could decide whether, as a matter of state law, Chapter 27-19 of the North Dakota Code really is such a statute. The Supreme Court of North Dakota has now held that it is. *Three Affiliated Tribes v. Wold Engineering, P.C.*, 364 N.W.2d 98 (N.D. 1985).

In sum, for the purposes of this case, Chapter 27-19 is a door closing statute, pure and simple. The question quite simply is whether, so viewed, it is valid.¹

¹ Although some of the provisions of Chapter 27-19 for tribal consent to state coercive jurisdiction over Indian defendants differ from the procedures of Public Law 280 as amended, 25 U.S.C. §§ 1321 *et seq.*, and are of questionable validity, see n.17, below, these provisions are not before this Court since there is no tribal consent to state assumption of jurisdiction in this case.

I. CHAPTER 27-19, AS CONSTRUED BY THE NORTH DAKOTA SUPREME COURT, IS PRE-EMPTED BY FEDERAL LAW.

State attempts to regulate the affairs of Indians and Indian tribes are pre-empted by federal Indian law where "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" determines that "in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Chapter 27-19, as construed by the North Dakota Supreme Court, is nothing more than an attempt to undermine the well-established federal policy of promoting tribal self-government.

It has long been established that Indian tribes are sovereign governments which exercise the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). Tribal powers extend "over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Congress² and the Executive Branch³

² See, e.g., the Royalty Management Act of 1982, 30 U.S.C.A. §§ 1731-1736 (West 1984) (authorizing delegation of Secretary's oil and gas inspection and enforcement responsibilities to Indian tribes); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-*et seq.* (1982); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (1982); Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3320(a), (c) (1) (1982) (allowing tribal taxes to be recovered under federal price regulations); Tribal Tax Status Act, 26 U.S.C.A. § 7871 (West 1984); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1982) (see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-66 (1978)).

³ E.g., H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970). More recently President Reagan has declared it the policy of his administration to "[deal] with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes . . ." White House Indian Policy Statement (January 23, 1983).

have consistently and strongly supported tribal sovereignty and self-government. As this Court has repeatedly noted, "the Federal Government is 'firmly committed to the goal of promoting tribal self-government.'" *Kerr-McGee Corp. v. Navajo Tribe*, — U.S. —, —, 85 L.Ed.2d 200, 205 (1985), quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983).

In its decision in this case, the Supreme Court of North Dakota made it clear that the policy of North Dakota is to coerce the Indian tribes within its borders to surrender a substantial portion of their sovereignty. It did so by making assent to state coercive jurisdiction a condition on the exercise of a fundamental right enjoyed by all citizens of North Dakota, and indeed all citizens of the United States—access to state courts.⁴

The purpose of the North Dakota Supreme Court's decision in this case is quite explicit in the concluding paragraphs of its opinion:

[T]he Indian people will not receive justice on a par with other citizens of this state until they realize that their rights are best preserved in the state courts and they *vote to accept* state jurisdiction in all civil cases; . . . Indians are now full citizens of this state, they have the franchise and they could receive the fruits of justice in our state courts if they would but accept jurisdiction for all civil purposes, . . .

364 N.W.2d 98, 107-08 (N.D. 1985) (emphasis in original).⁵

⁴ The North Dakota Supreme Court would apparently also require tribes to broadly surrender sovereign immunity. 364 N.W.2d 104 (N.D. 1985). Of course, immunity from suit is also a fundamental attribute of tribal sovereignty which was strongly reaffirmed by this Court in a unanimous decision as recently as seven years ago. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁵ In addition the entire opinion is replete with statements that the Tribes may gain access to North Dakota's courts if only they would assent to coercive state jurisdiction over suits against them.

In this case, the balancing of the state, federal and tribal interests mandated by *Bracker* clearly shows that Chapter 27-19, construed as a door closing statute, is pre-empted by federal law. Federal law has long protected Indian tribes from state intrusions into their affairs. *E.g.*, *Williams v. Lee*, 358 U.S. 217 (1978). Public Law 280, as amended by the Indian Civil Rights Act, 25 U.S.C. §§ 1321, *et seq.*, strictly controls state assumptions of jurisdiction over reservation Indians.⁶ The state purpose here, to coerce the tribes into assenting to state jurisdiction, is directly contrary to this federal and tribal interest in preserving tribal self-government. This is, in fact, the very interest the *Bracker* pre-emption test was intended to protect.

To be sure a state may, as a matter of state law, decline to exercise *coercive* jurisdiction over Indians as defendants, even where such jurisdiction is allowed under federal law. For example, notwithstanding the McCarran Amendment, 43 U.S.C. § 666, a state could, as a matter of state policy, decline to adjudicate Indian reserved water rights in state courts. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983). In such a case a state would be giving effect to a permissible state policy of resisting incursions into tribal self-government and affairs to an even greater extent than is required by federal law.

Here, however, North Dakota deprives Indian *plaintiffs* of access to the courts. Furthermore the state pur-

⁶ In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court recognized that the 1968 changes to Public Law 280 "manifest a congressional purpose to protect tribal sovereignty from undue interference." *Id.* at 63. This congressional purpose is turned on its head if the state pressures a tribe to exercise its option to consent to state jurisdiction by withholding benefits or rights if the tribe fails to do so.

pose in so doing is not a legitimate or permissible purpose, but rather is contrary to federal policy. Chapter 27-19, to the extent that it closes state court doors to Indian plaintiffs, is pre-empted by federal law. For this reason alone the decision must be reversed.

II. CHAPTER 27-19, AS CONSTRUED BY THE NORTH DAKOTA SUPREME COURT, IS UNCONSTITUTIONAL.

Indians are full citizens of the United States, and as such they are constitutionally entitled to the same rights as all other citizens. Thus Indians are entitled to vote in state elections,⁷ to run for and hold office,⁸ to have election districts which are properly apportioned,⁹ and to receive public services and benefits.¹⁰ Similarly, they enjoy the right—without condition—to petition a state court, as a voluntary plaintiff. And, as we shall show below, the decision of the North Dakota Supreme Court—by denying the Tribes that right, or conditioning it on the surrender of their sovereignty protected by federal law—violates the Equal Protection and Due Process clauses of the Fourteenth Amendment. The decision in

⁷ *E.g.*, *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962); *Harrison v. Leveen*, 196 P.2d 456 (Ariz. 1948); *see Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975).

⁸ *E.g.*, *Yanito v. Barker*, 348 F.Supp. 587 (D.Utah 1972) (three judge court).

⁹ *Goodluck v. Apache County*, 417 F.Supp. 13 (D.Ariz. 1975) (three judge court), *summarily affirmed sub nom. Apache County v. United States*, 429 U.S. 876 (1976).

¹⁰ *E.g.*, *Natonabah v. Board of Education*, 355 F.Supp. 716 (D.N.M. 1973) (public schools); *Acosta v. San Diego County*, 126 Cal. App. 2d 455, 272 P.2d 92 (1954) (welfare); *Bradley v. Arizona Corp. Commission*, 60 Ariz. 508, 141 P.2d 524 (1943) (business license).

this case, in addition to undermining federal Indian policy, thus violates the Constitution.

A. Chapter 27-19 Denies Indians Equal Protection Of Law.

Normally a state legislature is allowed wide discretion in determining the classification made by a statute; the statute will withstand an equal protection challenge if its classification is reasonably related to permissible state objectives. However, if a statute either makes a classification based on race,¹¹ or impinges on a fundamental right,¹² its classification must be necessary to promote a compelling governmental interest, or else the statute violates the equal protection clause.¹³ Chapter 27-19 of the North Dakota Code, as construed by the State Supreme Court in this case, *both* classifies on a racial ground *and* impinges on a fundamental right. Since it is not justified by any compelling state interest, it denies Indians the equal protection of the laws.

First, Chapter 27-19 makes a racial classification. Under the decision of the Supreme Court of North Dakota, Chapter 27-19 closes the doors of the state courts to Indians—and only Indians. There is no doubt that if an action were brought by a non-Indian against respondent on exactly the same claim as presented in this case,

¹¹ *E.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

¹² *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹³ This analysis requires not only that the statute serve a compelling state interest, but also that the classification made by the statute be precisely tailored and necessary to that interest. *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982); *cf. Sherbert v. Verner*, 374 U.S. 398, 407-08 (1963).

North Dakota's courts would hear it. Only the fact that the plaintiff was an Indian tribe distinguishes this case.

To be sure, the Supreme Court of North Dakota held that Chapter 27-19 was justified by the special federal power over Indian affairs. 364 N.W.2d at 106-107. And respondents seek to defend the statute as not involving a racial classification at all, but rather a political classification permissible under *Morton v. Mancari*, 417 U.S. 535 (1974). This effort must fail.

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court held that the "unique legal status of Indian tribes under federal law," *id.* at 551, permits the federal government to single out tribal Indians in legislation which might otherwise be unconstitutional. This holding depended upon the constitutional grant of power over Indian tribes in Article I, § 8, cl. 3, and upon the longstanding federal role as a guardian and protector of Indian tribes. *Id.* at 551-553.¹⁴

The states do not enjoy a similar special relationship with Indian tribes. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 501 (1979).¹⁵ Accordingly, states do

¹⁴ The special federal power to legislate with respect to Indians is very similar to the special federal power to legislate with respect to aliens. As with Indian affairs, there is a specific constitutional grant of authority to the federal government over immigration and naturalization. Compare U.S. Const., Art. I, Sec. 8, cl. 3 with U.S. Const., Art. I, Sec. 8, cl. 4. Accordingly, this Court has held that the federal government has sweeping powers to regulate the entry and stay of aliens, even where the conditions imposed would violate the Constitution if applied to citizens. *Fiallo v. Bell*, 430 U.S. 787, 792-93 (1977). But state statutes which separately classify aliens are subject to heightened scrutiny. *Nyquist v. Mauclet*, 432 U.S. 1, 7-8 (1977); *Plyler v. Doe*, 457 U.S. 202, 223-224 (1982).

¹⁵ Indeed, as this Court has recognized, "because of local ill feeling, the people of the States where they are found are often [the Indians'] deadliest enemies." *United States v. Kagama*, 118 U.S.

not have the same freedom that the federal government, and tribes themselves, have to enact legislation singling out Indians; state statutes which do so are subject to full equal protection analysis unless they are authorized by federal law. *Id.* at 501.

Nor is Chapter 27-19 enacted by North Dakota pursuant to the federal government's power over Indian affairs. As this Court has specifically held, Chapter 27-19, construed as a door closing statute, is neither required nor authorized by Public Law 280, or any other federal law. *Wold I*, 81 L.Ed.2d at 121-124. Thus, because the state law bars Indians—and only Indians—from state court, and because the state takes this action without authority in federal law, Chapter 27-19 makes a racial, not a political, classification and is, for the purposes of equal protection analysis, subject to strict scrutiny.

The possibility that some Indians may not be barred by Chapter 27-19¹⁶ or that they may, collectively or individually, escape the bar by assenting to coercive juris-

375, 384 (1886). Recent decisions of the Court illustrate vividly the continued vitality of this precept. See, e.g., *Ramoh Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) (“[state] courts below apparently gave short shrift to . . . [the Court’s] precedents in this area . . .”); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 696 n.36 (1979) (quoting this Court’s observation that “[e]xcept for some desegregation cases . . . the [federal] district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.”)

¹⁶ It is not clear whether the Supreme Court of North Dakota would apply its decision to off-reservation Indians within North Dakota. According to the 1980 census, only about 35% of the Indians in North Dakota live off of Indian reservations. Bureau of the Census, *American Indian Areas and Alaska Native Villages: 1980* 15 (Supplementary Report PC80-S1-13, 1984). Thus, at a minimum, the decision applies to 65% of the Indian population of North Dakota.

diction,¹⁷ does not change the basic racial nature of the classification.¹⁸ For Indians remain burdened in a way non-Indians are not: as a condition to access to the North Dakota courts, they are required by Chapter 27-19 to surrender their federally protected right to make their own laws and be governed by them.¹⁹

Second, Chapter 27-19 also denies Indians a fundamental right—the right of access to the courts. This right is an aspect of the First Amendment right to petition the government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Bill Johnson’s Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983). It is also a due process right of fundamental importance. *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148 (1907); *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422

¹⁷ Section 27-19-05, North Dakota Century Code, purports to authorize an individual Indian to assent to state coercive jurisdiction. The Supreme Court of North Dakota relied heavily on this section in its opinion in this case, although it had previously held it invalid as inconsistent with P.L. 280, as amended. Compare *Nelson v. Dubois*, 232 N.W.2d 54, 57 (N.D. 1975) with *Three Affiliated Tribes v. Wold Engineering, P.C.*, 364 N.W.2d 98, 104 (N.D. 1985).

Of course nothing in P.L. 280 authorizes a state to assume coercive jurisdiction over an individual Indian where his tribe has not voted to accept jurisdiction. And the right of the Indians to “make their own laws and be ruled by them,” *Williams v. Lee*, 358 U.S. 217, 220 (1959), is a tribal right. Thus, individual assent to state jurisdiction would not be sufficient to authorize state assertion of coercive jurisdiction over an Indian.

¹⁸ See *Nyquist v. Mauclet*, 432 U.S. 1, 8-9 (1977); cf. *Mathews v. Lucas*, 427 U.S. 495, 504 n.11 (1976); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

¹⁹ The North Dakota Supreme Court would apparently also require an Indian tribe to surrender its sovereign immunity from suit in order to gain access to state courts. See note 4, *supra*.

(1982).²⁰ Chapter 27-19 denies Indians any access whatsoever to the state courts for claims which arise on an Indian reservation. In some cases the result may be to leave the Indians without *any* forum in which to bring such claims.²¹ For this reason also, Chapter 27-19 must be subject to strict scrutiny under the equal protection clause.

Under the strict scrutiny test, Chapter 27-19 is invalid because it is not necessary to any compelling state interest.²² The only interest even suggested by the North Dakota Supreme Court is that it prevents the state "from imposing jurisdiction upon the Indian people or individual

²⁰ The due process right of access to the courts is further discussed in Section III, *infra*.

²¹ In this case for example, there is no federal question or diversity jurisdiction. And at the time suit was brought tribal courts were not available because, under tribal law, they lacked jurisdiction over the defendants.

Even where tribal law permits assertion of jurisdiction over a defendant, the tribal forum may not be available in a particular case because the defendant lacks the minimum contacts with the reservation necessary for the assertion of personal jurisdiction, or because the defendant has no assets on the reservation with which to satisfy a judgment. In the later case, a tribal court judgment *should* be enforceable in state court. *E.g.*, *United States v. Cox*, 59 U.S. (18 How.) 100, 104 (1856); *Jim v. CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975); *In re Marriage of Red Fox*, 542 P.2d 918, 920 (Or. App. 1975); *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624, 628 (1950). However, given the firmness with which the North Dakota Supreme Court has closed state courts to Indians in this case, it is questionable whether North Dakota's courts would enforce a tribal court judgment.

²² Respondents apparently so concede. In their opposition to the petition for certiorari they do not contend the statute could survive strict scrutiny. Respondents defend Chapter 27-19 solely on the ground that it is not subject to strict scrutiny because it is permissible under *Morton v. Mancari*, 417 U.S. 535 (1974). Brief in Opposition at 18-22, a contention we address, *supra*, pages 9 to 10.

Indians against their will and without their consent." 364 N.W.2d at 107. But Chapter 27-19, construed as a door closing statute, is wholly unrelated to this concededly legitimate purpose. When an Indian or Indian tribe is the plaintiff, he has *voluntarily* petitioned the state court to resolve a dispute with a non-Indian. In such a case no Indian is haled before the state court. No Indian is subjected to rules of conduct or duties created by state law. No Indian is subject to judgment.²³ The *coercive* power of the state is imposed only on the non-Indian defendant. Under these circumstances state jurisdiction is not imposed "against [the] will and without [the] consent" of the Indian plaintiff.²⁴ Indeed this Court has already addressed and rejected the only state interest asserted by North Dakota, when this Court held that the exercise of state jurisdiction in this case does *not* interfere with the tribal right of self-government. *Wold I*, 81 L.Ed.2d 113, 121-22.

²³ *Williams v. Lee*, 358 U.S. 217 (1959), would presumably bar affirmative relief against an Indian plaintiff on a counterclaim larger than, or not related to, the plaintiff's claim. That issue is not presented in this case, although a counterclaim was asserted, because the counterclaim was much smaller than the main claim, and thus was in the nature of a set-off. In any event, when the plaintiff is an Indian tribe, as opposed to an individual, counterclaims in excess of the plaintiff's claim, or not arising out of the same transaction, are barred by tribal sovereign immunity. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344-45 (10th Cir. 1982).

²⁴ To be sure there may be some circumstances where exercise of jurisdiction over Indian plaintiffs would be inconsistent with federal law. For example, if a tribal interest required *exclusive* tribal court jurisdiction over a particular kind of reservation dispute, and the tribe asserted that interest by ordinance granting its courts exclusive power to hear certain cases, the state might be required to defer to the tribal court. However, that is not this case, and a comprehensive ban on all suits by Indian plaintiffs is not required to protect that interest.

In fact, the real state interest at stake here is the interest in asserting as much state jurisdiction over Indian reservations as possible, at the expense of the tribes. At base, the North Dakota Supreme Court's interpretation of Chapter 27-19 is designed simply to coerce North Dakota tribes into assenting to state jurisdiction and waiving sovereign immunity. This is not only not a legitimate state purpose, it is a purpose directly contrary to federal Indian law and policy. See Section I, *supra*.

In sum, Chapter 27-19 is subject to strict scrutiny under the equal protection clause, both because it makes an explicitly racial classification and because it impinges on the fundamental right of access to the courts. Under strict scrutiny, the statute fails because it is not necessary to accomplish any compelling state interest.²⁵

B. Chapter 27-19 Denies Indians Due Process of Law.

The Tribes have a due process right of access to the state courts. Respondent so concedes, Brief in Opposition at 15, and this Court has consistently so held. *E.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982); *Bounds v. Smith*, 430 U.S. 817, 821-825 (1977). As this Court stated nearly eighty years ago:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in

²⁵ Even if not subject to strict scrutiny, the statute fails to survive equal protection analysis because its classification is not rationally related to any legitimate state interest; indeed, it seeks to accomplish a state goal which is directly contrary to federal Indian policy.

this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907).²⁶

Respondent seeks to defend Chapter 27-19 as an exercise of the state "interest in fashioning its own rules of tort law," or as a mere procedural requirement. Brief in Opposition at 16. But Chapter 27-19 is not a substantive defense to the tort and contract claims asserted by the Tribes. Nor is it a procedural rule such as a statute of limitations.

Rather, Chapter 27-19, as construed by the State Supreme Court, is a door closing statute, pure and simple. It denies Indians *any* opportunity for a hearing on any claim arising on the reservation, whatever its nature or merit, unless the Indian first surrenders valuable rights protected by federal law and policy. This the state may not do. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

Respondent argues that it is somehow unfair to allow the Tribes to bring suit in state courts and at the same time retain its protected status under *Williams v. Lee* from suits against it in these courts. Brief in Opposition at 22. On the contrary, that result is perfectly fair and natural. Under traditional jurisprudence, whatever other courts may be available, the one court which is

²⁶ The importance of the right of access to the courts was also recognized by Congress in one of the earliest civil rights statutes. 42 U.S.C. § 1981 provides (emphasis added):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

always an appropriate forum for a claim is the defendant's own court. *Williams v. Lee* holds that if one wishes to sue a reservation Indian, one must go to the Indian's court—the tribal court. Similarly, the courts of the United States, and of the states, routinely entertain suits brought by foreign nations and foreign citizens as plaintiffs, even where those courts would lack jurisdiction over the foreign parties as defendants. *E.g.*, *Pfizer, Inc. v. India*, 434 U.S. 208, 318-319 (1978). And in *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142 (1907), this Court held that the courts of all states had to be available to all citizens of the United States as plaintiffs, although the vast majority of these persons could not be sued as defendants.²⁷ All the Tribes seek in this case is the right—protected by due process—to assert their claims in the courts of the defendants' state.²⁸

²⁷ At the time *Chambers* was decided, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), was 40 years in the future; *Pennoyer v. Neff*, 95 U.S. 714 (1878) was the law and long arm jurisdiction was essentially unknown. Even in the modern law of personal jurisdiction, most people are not subject to suit in most state courts because they lack the requisite minimum contacts. But that has never been thought to be a ground for denying these persons access to those courts as plaintiffs.

²⁸ Surely respondents, a North Dakota professional corporation and a North Dakota partnership, have little to complain about if the Tribe chooses to bring its claim in North Dakota courts instead of dragging respondents into tribal court. Indeed, one suspects that they would *prefer* the North Dakota courts, but for a tactical judgment that, in this case, they can escape liability altogether if they defeat state court jurisdiction.

CONCLUSION

The decision of the North Dakota Supreme Court should be reversed and the case remanded with instruction to the North Dakota trial court to deny the motion to dismiss for lack of jurisdiction, and to proceed to the merits of the case.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

KV
MOTION FILED

DEC 9 1985

No. 84-1973

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IN THE
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October Term, 1985

THREE AFFILIATED TRIBES OF THE FORT
BERTHOLD RESERVATION, Petitioner,

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MOTION FOR LEAVE TO FILE BRIEF
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OF THE TURTLE MOUNTAIN BAND OF
CHIPPEWA INDIANS

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE
OF THE TURTLE MOUNTAIN BAND OF
CHIPPEWA INDIANS

Pursuant to Rule 36.3, the Turtle
Mountain Band of Chippewa Indians
moves the Court for leave to file the
attached brief amicus curiae in

(x)

support of petitioner in the
above-captioned case. Petitioner
Three Affiliated Tribes has no
objection, nor does Respondent
Schmidt, Smith & Rush. However,
Respondent Wold Engineering has
objected, therefore, this motion is
being filed.

Amicus is a federally-recognized
Indian tribe whose reservation is
located in Rolette County, North
Dakota. Amicus has a great interest
in the case, since if the decision
below is affirmed, its access to state
court will be conditioned upon a
waiver of important incidents of its
sovereignty, and its right to equal
protection and due process will be
denied.

(xi)

Amicus submits the attached brief in order to assist the Court in recognizing that Chapter 27-19, N.D.C.C., as construed, unlawfully infringes on tribal sovereignty, denies Tribes equal protection and due process in violation of the Fourteenth Amendment and violates 42 U.S.C. § 1981. The immediate parties are likely not to address specific points which amicus discusses, especially concerning infringement on tribal sovereignty, and therefore, amicus requests that its motion be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether Chapter 27-19, N.D.C.C., as construed, unlawfully infringes on tribal sovereignty?
2. Whether Chapter 27-19, N.D.C.C., as construed, denies the Three Affiliated Tribes equal protection of the laws and due process, as guaranteed by the Fourteenth Amendment?
3. Whether Chapter 27-19, N.D.C.C., as construed, violates 42 U.S.C. § 1981?

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OF THE TURTLE MOUNTAIN BAND OF
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INTEREST OF AMICUS CURIAE

Amicus is a federally-recognized
Tribe whose reservation is located in
Rolette County, North Dakota. Amicus
has an interest in the case, since if

the decision below is affirmed, amicus
curiae's access to North Dakota's
state courts will be conditioned upon
a waiver of important elements of its
federally-protected sovereignty and
its Fourteenth Amendment rights will
be denied.

Amicus submits the attached brief
to assist the Court in recognizing
that Chapter 27-19, N.D.C.C., as
construed, unlawfully infringes on
tribal sovereignty, denies Tribes
equal protection and due process in
contravention of the Fourteenth
Amendment and violates 42 U.S.C. §
1981.

STATUTES INVOLVED

The applicable statutes are set
out in the Appendix to the Petition
for Certiorari (App. 27-31).

STATEMENT OF THE CASE

A. This Court's Initial Decision

This case is before the Court a second time. In Three Affiliated Tribes v. Wold Engineering, 104 S.Ct. 2267 (1984) (Wold I), the Court construed Pub. L. 280, 67 Stat. 588, a federal law authorizing states to extend their jurisdiction over certain causes of action arising in Indian country, as neither authorizing nor requiring states to disclaim jurisdiction over causes of action arising in Indian country and brought by a Tribe against non-Indians. The Court remanded to the Supreme Court of North Dakota for reconsideration of its holding that the state legislature had precluded jurisdiction over this action. The decision of the

North Dakota Supreme Court on remand is now here for review.

The background of this case is summarized in this Court's previous opinion. 104 S.Ct. at 2271-73. Petitioner Three Affiliated Tribes of the Fort Berthold Reservation (Tribe) is a federally-recognized Indian Tribe with its reservation in northwestern North Dakota. In 1980, petitioner sued respondent Wold in a North Dakota state court for negligence and breach of contract in connection with the design and construction of a water supply system located within the reservation. The subject matter of petitioner's complaint clearly fell within the scope of the state trial court's general jurisdiction, Id. at 2271, but the district court granted

respondent's motion to dismiss on the grounds that the state courts did not have jurisdiction over causes of action arising in Indian country and brought by an Indian tribe against non-Indians. This decision was affirmed by the Supreme Court of North Dakota. Three Affiliated Tribes, etc. v. Wold Engineering, P.C., 321 N.W.2d 510, 512 (N.D. 1982).

That court also rejected the argument that to deny an Indian plaintiff access to sue a non-Indian in state court for a claim arising on an Indian reservation would violate the Fourteenth Amendment. 321 N.W.2d at 513.

The state court's decision that it had no jurisdiction was based on its

interpretation of state laws enacted in 1958 and 1963.^{1/} In 1958, North Dakota amended its constitution to authorize its legislature to "provide for the acceptance of such jurisdiction over [Indian country] as may be delegated to the state by act of Congress." N.D. Const., art. XIII, § 1, cl. 2. In 1963, the North Dakota

^{1/}Before 1958, North Dakota had taken an expansive view of the scope of state-court jurisdiction over Indians in Indian country. See Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957). This view was consistent with the state's Constitution granting access to the state's courts to everyone. N.D. Const., art. I, § 9. The text of this constitutional provision and Chapter 27-19 is contained in the Petition for Certiorari at App. 27 (hereinafter App.).

legislature enacted Chapter 27-19, the pertinent section of which provides:

. . . jurisdiction of the State of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter

§ 27-19-01, N.D.C.C. (App. 27-28).

The state court decision in the present case rests on the North Dakota Supreme Court's holding that § 27-19-01, by negative implication, precludes jurisdiction over the present case. 321 N.W. 2d at 512.

This Court was unable to determine whether the North Dakota decision was based on an erroneous interpretation of federal law, Pub. L. 280, as

authorizing a state to eliminate jurisdiction. Therefore it remanded. The Court made clear in its opinion that neither federal preemption nor tribal interference with tribal self-government, precluded North Dakota courts from entertaining a civil action by an Indian tribe against a non-Indian for a claim arising on an Indian reservation. Id. at 2274.

B. The State Court's Decision On Remand

On remand, the State Supreme Court held that § 27-19-01 precluded jurisdiction over this action regardless of Pub. L. 280:

As neither the act itself nor the legislative history provides for or recognizes any type of

'residuary' state jurisdiction, we conclude that the act terminated any such jurisdiction if it did previously exist.

Three Affiliated Tribes, etc. v. Wold Engineering, P.C., 364 N.W.2d 98, 104 (N.D. 1985).

The court went on to conclude, however:

[T]he Affiliated Tribes in this case may properly bring their action in state court providing they comply with Section 27-19-05. This will subject the property of the Tribes, as distinguished from the property of the individual Indians, to levy and execution pursuant to judgment of the state court except as such property may be exempt therefrom by appropriate state or federal law.

364 N.W.2d at 103-04.

Having thus construed § 27-19-01, the Court held that none of the state's constitutional provisions was violated because there was conditional access to state court, 364 N.W.2d at 104, and it held the state law did not violate the Fourteenth Amendment. 364 N.W.2d at 106.

The status of state law on this issue, in light of the North Dakota Supreme Court's decision on remand, is as follows:

Section 27-19-01, N.D.C.C. eliminates jurisdiction over causes of action arising in Indian country and brought by an Indian tribe against a non-Indian.

Section 27-19-05 titled "Individual acceptance" and which

provides "an individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided" has now been held to apply to tribes (App. 28-29). As noted, the only exception is that property exempt from execution and levy by state or federal law will continue to be exempt.^{2/}

^{2/}Another statute, § 27-19-02, provides for tribal acceptance of state jurisdiction by petition of a majority of the enrolled residents or by vote of a majority of the enrolled residents at a special election called for that purpose (App. 28).

Section 27-19-08 provides that civil jurisdiction covered by Chapter 27-19 shall include but shall not be limited to the "determination of parentage of children, termination of parental rights, commitments by county mental health boards or county judges, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents." (App. 29-30).

Section 27-19-13 provides that an "individual" who has accepted jurisdiction under § 27-19-05 may withdraw upon filing of a statement to that effect. "Such withdrawal shall not affect causes of action which arose prior to such withdrawal or contractual obligations which were incurred prior to such withdrawal." (App. 31).

SUMMARY OF ARGUMENT

Chapter 27-19, N.D.C.C., as construed, unlawfully infringes on tribal sovereignty in that it conditions tribal access to state court on a waiver of tribal immunity from suit and a waiver of tribal governmental rights over its reservation. Conditioning the Tribe's access to state courts also denies to the Tribe equal protection of the laws and due process under the Fourteenth Amendment to the United States Constitution. Finally, North Dakota law violates 42 U.S.C. § 1981.

ARGUMENT

I. CHAPTER 27-19, AS CONSTRUED, UNLAWFULLY INFRINGES ON TRIBAL SOVEREIGNTY

The North Dakota Supreme Court held that Section 27-19-01, N.D.C.C.

precludes state court jurisdiction over this action unless the Tribe consents to waive its sovereign immunity and its governmental authority over its reservation in many important matters. This Court has consistently protected tribal sovereignty. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the Tribes retain their existing sovereign powers." United States v. Wheeler, 435 U.S. 313, 323 (1978). Indian tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by

implication as a necessary result of their dependent status." Id. Tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States." Washington v. Confederated Tribes, 447 U.S. 134 (1980).

Two important tenets of tribal sovereignty are infringed by North Dakota here. The first is sovereign immunity from suit. The Tribe's access to court is conditioned upon a waiver of sovereign immunity from suit. The only apparent exception to this waiver is that any tribal property exempt from execution by state or federal law will remain exempt. 364 N.W.2d at 103. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

The second infringement is of the governmental interest of the Tribe in regulating matters within the boundaries of the Reservation. Williams v. Lee, 358 U.S. 217 (1959); Fisher v. District Court, 424 U.S. 382 (1976). The jurisdiction to which the Tribe would be submitting were it to comply with the state court's interpretation of § 27-19-05 includes, but is not limited to "the determination of parentage of children, termination of parental rights, commitments by county mental health boards or county judges, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents." § 27-19-08 (App. 29-30).

North Dakota simply cannot condition the exercise of the basic right to sue in this manner.^{3/} This Court has repeatedly struck down attempts by states to condition the exercise of privileges on a waiver of federal rights. See, e.g., Terral v. Burke Construction Co., 257 U.S. 529 (1922). A state may not, as a condition of allowing a foreign corporation to do business in the state, require a corporation to forgo its right to avail itself of access to

^{3/}25 U.S.C. § 1326 provides support for this view as well. That provision contemplates a voluntary election to decide whether to submit to state jurisdiction. Here, the state is coercing such a vote by denying access to its courts. This is improper. Cf. Kennerly v. District Court of Montana, 400 U.S. 423 (1971).

federal court. This conclusion results even though the corporation could be denied outright the privilege of doing business in the state and even though the state court would still have been open to the corporation. See also Hanover Fire Insurance Co. v. Carr, 272 U.S. 494 (1926). Here, the state is conditioning what its own constitution establishes as a right on a waiver of federal rights. A fortiori, this attempt must fail.^{4/}

^{4/}The situation is somewhat analogous to the field of immigration law where congressional power is paramount. See Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 (1948):

[States can] neither add to nor take from the conditions lawfully imposed by Congress upon (footnote continued on next page)

Here, federal law guarantees tribal sovereignty and its incidents. The Supremacy Clause prevents any state qualification of a federal right. Antoine v. Washington, 420 U.S. 194, 205, 206 (1975); Puyallup Tribe v. Department of Game, 391 U.S. 392, 399 (1968). The sovereign status of tribes is constitutionally

4/ (continued)
admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration and have accordingly been held invalid.

Id.

recognized. Washington v. Washington Fishing Vessel Association, 443 U.S. 658, 673 and n.20 (1979).

This Court has been very protective of a tribe's sovereign immunity. See Santa Clara Pueblo v. Martinez, supra; United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940). In the latter case, this Court held that a federal statute allowing cross claims against Indian tribes in "any United States Court in the Indian Territory," did not authorize such a cross claim in other courts even though the main cause of action itself was transitory.

The sovereignty possessing immunity should not be compelled to defend against cross actions away from its own territory or in courts, not of its own choice, merely because

its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian nations with their unusual governmental organizations and peculiar problems.

309 U.S. at 513.

What North Dakota is trying to do here is no different than if it tried to condition the right of access of the United States to state court on a waiver of the federal government's sovereign immunity. That would not be tolerated by this Court, and neither should the present attempt.

II. NORTH DAKOTA'S RESTRICTION OF TRIBAL ACCESS TO ITS COURTS CONSTITUTES A DENIAL OF EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Equal Protection

1. Rational Basis

Every state legislative classification must at least be rationally related to the purpose of the law making the classification. Cleburne v. Cleburne Living Center, 105 S.Ct. 3249 (1985). The North Dakota law at issue here does not meet that test.

The only purpose put forth by the state court for Chapter 27-19, N.D.C.C. is that it "is a limitation of the state judicial system preventing it from imposing jurisdiction upon the Indian people or individual Indians against their will

and without their consent." 364 N.W.2d at 107. This rationale has no application where, as here, the Tribe has voluntarily come into state court. Wold I, 104 S.Ct. at 2274. If North Dakota desired to avoid imposing state jurisdiction on unwilling Indians, it need only have regulated jurisdiction over involuntary defendants; not voluntary plaintiffs. This is a classic case of an overbroad class. Tussman and ten Broek, "The Equal Protection of the Laws" 37 U. Cal. L.Rev. 341, 352 (1940). Overbroad classes are characterized by "flagrant injustice" since they disadvantage persons who bear no relation to the mischief sought to be cured by the law. 37 U. Cal. L.Rev. at 352.

2. Heightened Scrutiny

In the alternative, § 27-19-01 does not meet the test of strict scrutiny to which it should be subject.

The North Dakota Constitution declares that "every man for any injury done him . . . shall have remedy by due process of law . . .". N.D. Const., art I, § 9 (App. 27). The right of access to state court is thus a fundamental state constitutional right. The right is also recognized as part of the guarantee in the First Amendment of the right to petition the government. Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); California Motor Transport Co. v. Trucking

Unlimited, 404 U.S. 508, 510 (1972).
See also Douglas v. California, 372
U.S. 353 (1963); Griffin v. Illinois,
351 U.S. 12 (1956). See also Corfield
v. Coryell, 6 F.Cas. 546, 552
(C.C.E.D. Pa. 1825) (No. 3230), quoted
in Baldwin v. Montana Fish and Game
Commission, 436 U.S. 371, 384 (1978)
(access to state courts among the
fundamental rights guaranteed to
non-resident citizens).

North Dakota does not limit the
exercise of this right by
non-citizens, non-residents or
aliens. There is no restriction on
non-Indians suing non-Indians on
causes of action arising in Indian
country. The state may even sue a
non-Indian for reimbursement of

monies paid to an Indian in connection
with injuries suffered on a
reservation. State Ex Rel Moug v.
North Dakota Automobile Assigned
Claims Plan, 341 N.W.2d 623, 626 (N.D.
1983).

The state itself may sue as a
plaintiff even though it has waived
its immunity from suit as a defendant
only to a limited extent. § 32-12-02,
N.D.C.C. (Title and contract
actions--but no execution may be had
on a judgment. They are presented to
the legislature for appropriation.
§ 32-12-04, N.C.C.C.). There
apparently are no state conditions on
the federal government's right to sue
in state court as a plaintiff even
though it is protected by sovereign
immunity. Tribes, alone, are
restricted in their right to exercise

a state-guaranteed constitutional right. Restriction of such rights is subject to strict scrutiny. Shapiro v. Thompson, 394 U.S. 618 (1969).

The second reason for applying strict scrutiny is that a suspect class is involved. When only federal law affecting Indians is involved:

As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

Morton v. Mancari, 417 U.S. 535, 555 (1974).

This test has been applied to a variety of federal laws. So long as a law relates in a rational way to the special sovereign status of Indian tribes, it will not be analyzed as a racial classification, and will be

upheld whether it arguably advantages or disadvantages Indians in a particular case.^{5/}

When state law is involved, if the state law is authorized by federal law, a somewhat similar rational relation test will be applied. Thus, in Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), the Court rejected the Tribes' attack on a state law selectively assuming jurisdiction under Pub. L. 280 on the grounds that it violated the Tribes' right to equal protection. Since the Court found the

^{5/}Delaware Tribal Business Commission v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Cf. Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976); Washington v. Fishing Vessel Association, 443 U.S. 658 (1979); Fisher v. District Court, 424 U.S. 382 (1976).

state law was authorized by federal law, it applied the rational relation test.

The law was upheld since it was "fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands." 439 U.S. at 502.

The stark difference between this case and Yakima is that here the Court has already ruled that the state law is not authorized by Pub. L. 280. The clear implication of Yakima is that where state law is not authorized by federal law, it is subject to heightened scrutiny. That is also the

clear implication of this Court's opinion in Wold I where, in remanding, this Court indicated that "the court's treatment of petitioners' constitutional claims strongly suggest that the court's underlying interpretation of Chapter 27-19 would have been different if the court had realized from the outset that federal law does not insulate the present jurisdictional disclaimer from state and federal constitutional scrutiny." 104 S.Ct. at 2277.

This view is not in conflict with this Court's holding in Morton v. Mancari, supra, that congressional classifications dealing with Indians are based on dealings with semi-sovereign entities and not based on race. States do not, in

general, have the same unique historical relations with tribes that the federal government does.

Washington v. Yakima, supra. State classifications dealing with Indians would be political or racial depending upon whether they were required by or consistent with federal policy encouraging tribal self-government.

Here, the Tribe, although a political entity, is being treated the same as individual Indians in the state scheme. See § 27-19-05, N.D.C.C.

Wold I has established that there is nothing about the tribal status of the Tribe here that affects North Dakota's ability to assume jurisdiction over this cause of action; therefore, insofar as this case is concerned,

North Dakota's discrimination against the Tribe can only be seen as racial.

Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. Regents of University of California v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.); Korematsu v. United States, 323 U.S. 214 (1944). At least one Court of Appeals has applied strict scrutiny to a state law disadvantaging Indians. Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975) (striking down state law preventing residents of unorganized counties from voting for county government officials of organized counties who also governed the unorganized counties.

Residents of unorganized counties were predominantly Indians).

The inevitable effect of Chapter 27-19, as interpreted, is to restrict access to state court unless tribes disavow their federal rights in order to come in on a par with other private plaintiffs. Cf. Wold I, dissent of Rehnquist, J. If this is the state's purpose, it is an illegal purpose since it is for Congress to say when a tribe's sovereignty may be infringed. The objective is simply not related in any way to a purpose left to the states to determine. The interest certainly is not compelling since neither North Dakota nor the United States come into court on an equal

basis with private individuals.^{6/}

The statute has as its effect the extortion of federal Indian rights as a condition to access to a state forum otherwise available. This is blatantly illegitimate. Cf. United States Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

B. Due Process

A state law denying access to its courts denies due process of law unless justified by "the magnitude of the governmental interests involved."

^{6/}Also, strict scrutiny, state law can be only if it has selected the "less drastic means" for effectuating its objectives. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973). As point out, supra, pp. 23-24, here there is an overbroad class.

Logan v. Zimmerman Brush Co, 455 U.S. 422, 434 (1982). See also, Little v. Streater, 452 U.S. 1 (1981); Boddie v. Connecticut, 401 U.S. 371 (1971). No significant interest of the State is identified in the opinion below. In contrast, the interest of the Tribe is great. Thus the State's action denies petitioner and others similarly situated due process of law.

III. NORTH DAKOTA'S DENIAL OF TRIBAL
ACCESS TO COURTS VIOLATES 42
U.S.C. § 1981

42 U.S.C. § 1981 provides in relevant part that "all persons within the jurisdiction of the United States shall have the same right in every State . . . to sue . . . as is enjoyed by white citizens. . . ." This section rests on the implementing provisions of both the Thirteenth and

Fourteenth Amendments. Runyon v. McCrary, 427 U.S. 160, 168-69 n.8 (1976); Mahone v. Waddle, 564 F.2d 1018, 1030 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978). The provision has been held to prohibit racial discrimination against Indians. Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975); Cf. Wilson v. Legal Assistance of North Dakota, 669 F.2d 562 (8th Cir. 1982).

Whether or not 42 U.S.C. § 1981 was specifically argued below, this Court can reach the issue. Boynton v. Virginia, 364 U.S. 454, 459 (1960). (Statutory claims reached though not argued in state Supreme Court where sufficiently related to claims actually made.) Here, the claim under

the Equal Protection Clause of the Fourteenth Amendment is similar to that under 42 U.S.C. § 1981. In addition, North Dakota itself has a state constitutional provision opening its courts to all persons. N.D. Const., art. I, § 9. In all practical respects, the issue has been before the North Dakota courts.

CONCLUSION

The decision of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

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BRIEF

6
No. 84-1973

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In The
Supreme Court of the United States

October Term, 1985

— o —
THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,

Petitioner,

v.

WOLD ENGINEERING, P.C.
AND SCHMIDT, SMITH & RUSH,

Respondents.

— o —
**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA**

— o —
**BRIEF OF AMICUS CURIAE
FOR THE STATE OF NORTH DAKOTA**

— o —
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INTEREST OF THE AMICUS CURIAE

This brief presents the important question of whether N.D.C.C. Ch. 27-19, enacted in response to the Act of August 15, 1953, 67 Stat. 588, as amended, commonly known as Public Law 280 (hereinafter referred to as P. L. 280), which requires tribal Indians to accept state court subject matter jurisdiction as a condition precedent to the exercise by the courts of the state of jurisdiction over civil causes of action arising on Indian reservations and involving Indian litigants, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The State of North Dakota has a substantial interest in the resolution of this issue. The decision of the North Dakota Supreme Court below held that an Indian tribe could bring a civil action in state court, provided it complied with the Indian Civil Jurisdiction Act, N.D.C.C. Ch. 27-19. The Court also ruled that the Act, as so construed, violated neither the State nor Federal Constitution and will allow Indian litigants access to the courts of North Dakota if they choose to do so. The Indian tribes and Indian citizens of the state have deprived themselves of access to state courts because they have not accepted state jurisdiction. This leads not only to hardship where Indian plaintiffs are involved, but it also leads to hardship for non-Indian plaintiffs who may have a legitimate cause of action against an Indian tribe or an individual Indian arising in Indian country.

Access to the courts of North Dakota is within the power of the petitioners. The tribe must merely consent to the full civil jurisdiction which North Dakota, pursuant to P. L. 280, stands ready to offer them.

SUMMARY OF THE ARGUMENT

In 1953, Congress passed P. L. 280, 28 U.S.C. § 1360, which mandated to some states and allowed other states to assume both criminal and civil jurisdiction over Indian reservations. Under the authority of P. L. 280, the people of North Dakota in 1958 amended their Constitution to remove any legal impediment to the assumption of this jurisdictional offer. In 1963, the North Dakota legislature, also acting under P. L. 280 and the constitutional amendment, enacted N.D.C.C. Ch. 27-19. That chapter permits the courts in North Dakota to take jurisdiction over all civil actions which arise on an Indian reservation upon the acceptance of such jurisdiction by Indian citizens. The petitioner has not consented to this state subject matter jurisdiction pursuant to N.D.C.C. Ch. 27-19.

The petitioner contends that N.D.C.C. Ch. 27-19 bars Indian plaintiffs from access to state court in circumstances where non-Indian plaintiffs may clearly maintain actions. The petitioner contends that this violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The State of North Dakota contends that N.D.C.C. Ch. 27-19 does not act as a bar, but rather acts as an opportunity for Indians and Indian tribes to take advantage of the jurisdictional offer given them by the State of North Dakota. N.D.C.C. Ch. 27-19, while allowing individual Indians as well as tribes to bring actions, would also permit state subject matter jurisdiction to be brought against them. Indian litigants would have the same equal access to the courts of North Dakota as non-Indian litigants. The Indian people have deprived themselves of access to state courts because they have not accepted state subject matter juris-

diction. In essence, the Indian citizens and Indian tribes of the State of North Dakota hold the keys to the courthouse and may take advantage of the jurisdictional offer of the State of North Dakota by complying with N.D.C.C. Ch. 27-19.

ARGUMENT

“Since the earliest years of this nation, courts and legislatures of both the federal government and the states have struggled to define their relationship between the American Indian and the multiple governments of the United States.”¹

This Court established early that states are barred from extending their jurisdiction to Indian country absent congressional consent. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Rice v. Rehner*, 463 U.S. 713 (1983). The basis for this is found in the policy that state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe upon the right of reservation Indians to make their own laws and to be ruled by them. *Williams v. Lee*, 358 U.S. 217, 219-220 (1959).

In 1953, in an effort to deal with the “problem of lawlessness on certain Indian reservations, in the absence of adequate tribal institutions of law enforcement,” *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 379 (1976), Congress enacted P. L. 280, 28 U.S.C. § 1360.² P. L. 280 orig-

¹Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L.Rev. 535 (1975)

²Act of August 15, 1953, Ch. 505, 67 Stat. 588-90, amended and codified in several sections of 18-28 U.S.C.

inally transferred to five states immediate cession of criminal and civil jurisdiction over Indian country. To all other states, including North Dakota, P. L. 280 gave the states the option of assuming criminal and civil jurisdiction over causes of action arising within Indian country without the consent of the tribes. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). P. L. 280 provided states not having jurisdiction with respect to criminal offenses and civil causes of action, or with respect to both, shall assume jurisdiction in "such manner as the people of the state, by affirmative legislative action" may choose. P. L. 280, § 7. The purpose of P. L. 280 was to facilitate the transfer of jurisdictional responsibility to the state. *Washington v. Confederated Bands and Tribes*, 439 U.S. at 505.

P. L. 280 presented several avenues which states could use to comply with the Act. Section 6 of the original Act gave consent to the states to amend "where necessary" its state constitution or statutes to remove "any legal impediment to the assumption of jurisdiction." Pursuant to P. L. 280 the voters of North Dakota approved an amendment to the North Dakota Constitution which removed any legal impediment to the assumption of jurisdiction.³

³N.D. Const. Art. XIII, § 1, provides, in part, as follows:

2. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the

(Continued on following page)

Thereafter, in 1963, the North Dakota legislature, after considering the findings of an interim legislative research committee as well as evidence presented by Indians as well as non-Indians, enacted N.D.C.C. Ch. 27-19 pursuant to its authority under P. L. 280. *Three Affiliated Tribes v. Wold Engineering*, 364 N.W.2d 98, 101-104, (N.D. 1985). As the bill was originally introduced, the state was to *unilaterally* accept exclusive jurisdiction for all civil causes of action which arose on the Indian reservations in North Dakota. *Id.* at 102. After considering the testimony of individuals who asserted that "civil jurisdiction should not be assumed by the state without a vote of the Indian people," *id.* at 103, the bill was amended and a compromise position was reached. The state would extend its full civil subject matter jurisdiction to civil causes of action arising within Indian country but conditioned upon tribal or individual acceptance.⁴ As the North Dakota Supreme Court stated in *Wold*:

(Continued from previous page)

United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress.

(Emphasis supplied.)

⁴N.D.C.C. §§ 27-19-01, 27-19-02, and 27-19-03 provide as follows:

27-19-01. ASSUMPTION OF JURISDICTION. In accordance with the provisions of Public Law 83-280 and section 1 of article XI of the Constitution of North Dakota, jurisdiction of the state of North Dakota shall be extended over all civil claims for relief which arise on an Indian reservation upon acceptance by Indian citizens in a manner pro-

(Continued on following page)

In light of this background and seeming intent of the legislature to accommodate the will of the Indian people in Section 2 (N.D.C.C. § 27-19-02) and ~~the~~ will of the individual Indian in Section 5 (N.D.C.C. 27-19-05) to accept state jurisdiction, even to the extent of providing for a means of the Indian people in Sections 11 and 12 and the individual Indian in Section 13 N.D.C.C. §§ 27-19-11, 27-19-12, and 27-19-13) for withdrawing from state civil jurisdiction, and further in keeping with our policy construing a statute to uphold its constitutionality against either state or federal constitutional attack, we conclude that the Affiliated Tribes in this case may properly bring their action

(Continued from previous page)

vided by this chapter. Upon acceptance the jurisdiction of the state is to the same extent that the state has jurisdiction over other civil claims for relief, and those civil laws of this state that are of general application to private property have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.

27-19-02. METHOD OF ACCEPTANCE.—Acceptance of jurisdiction may be by either of the following methods:

1. Upon petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older; or
2. The affirmative vote of the majority of the enrolled residents voting who are eighteen years of age or older, at an election called and supervised by the North Dakota Indian affairs commissioned upon petition of fifteen percent of those eligible to vote at such an election.

27-19-03. ACCEPTANCE PROCLAMATION.—Upon acceptance of civil jurisdiction by either method provided in section 27-19-02 the executive director of the Indian affairs commission shall certify such acceptance to the governor. Upon such certification the governor shall, within ten days, issue a proclamation proclaiming that thirty days from the date of the issuance of such proclamation the provisions of this chapter shall be in effect.

in state court providing they comply with Section 27-19-05.

Id. at 103.

Therefore, it is clear that the North Dakota legislature complied not only with the requirements of P. L. 280 but also with the will of the Indian people. *See Washington v. Confederated Bands and Tribes*, 439 U.S. 463 (1979).

The North Dakota legislature, in enacting N.D.C.C. Ch. 27-19, has conditioned the State of North Dakota's assumption of jurisdiction over claims arising on Indian reservations on the consent of tribal Indians. The plaintiffs in this case, the Three Affiliated Tribes of the Fort Berthold Indian Reservation, contend that these conditions infringe upon their constitutional guarantees of due process and equal protection. As an initial matter, this Court has already held that state laws which are enacted pursuant to explicit congressional authority and which classify Indians do not create a "suspect class" or abridge a "fundamental right" for equal protection purposes. *Washington v. Confederated Bands and Tribes*, 439 U.S. at 500, 501. This Court has in the same case held that "any options state can condition the assumption of jurisdiction on tribal consent." *Id.* at 495.

Since there is neither a fundamental right nor a suspect class present in this case, the issue becomes whether the requirements of N.D.C.C. Ch. 27-19 fail to meet the conventional equal protection test that legislative classifications are valid unless they bear no rational relationship to the states objectives. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

The State has an obvious interest in providing a forum in which all of its citizens of the state may be heard. The

State has tempered this interest in regard to claims arising from the State's Indian reservations. As stated by the North Dakota Supreme Court in *Three Affiliated Tribes v. Wold Engineering*, 364 N.W.2d 98 (N.D. 1985):

Chapter 27-19 does not constitute a restriction against Indian people or individual Indians accepting the jurisdiction of the state judicial system, rather it is a limitation of the state judicial system preventing it from imposing jurisdiction on the Indian people or on individual Indians against their will and without their consent. The statute does not treat them less than equal, it treats them more than equal. In light of the fact that they have demanded this equal treatment, they cannot reasonably complain of it, especially when they have within themselves the power to be free from its protective web if they so desire.

Id. at 107.

Simply put, N.D.C.C. Ch. 27-19 allows for two-way jurisdiction, fairness and equity for all citizens in the State of North Dakota. This is a far cry from the position of the petitioners that North Dakota must allow them to use the courts of North Dakota when they wish to without the fear of being called before one and required to defend an allegation of civil wrongdoing. The petitioners' position would make the Indian tribes and Indian people in North Dakota more equal than any other citizen of North Dakota and this Court should not subscribe to such a position.

Even if it is assumed, however, that N.D.C.C. Ch. 27-19 is subject to strict scrutiny, the statute passes muster because it does not abridge the tribe's guarantee of equal protection, nor does it discriminate against the tribe in any way. Indian tribes have been recognized by this Court as limited sovereigns possessing attributes of sovereignty

subject to the will of Congress. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). N.D.C.C. Ch. 27-19 acts as an offer by one sovereign, the State of North Dakota, to another sovereign, the petitioners in the case, to use the courts of North Dakota. This offer of jurisdiction is open to other tribes in the state as well. North Dakota has simply conditioned this use of its courts by a different sovereign on the consent of that sovereign. By doing so, North Dakota has made an effort to guarantee fairness to all litigants who use its courts, regardless of whether they are Indian or non-Indian. If Indian litigants wish to use the courts of North Dakota, fairness would dictate that they come into court on an equal footing with other citizens of North Dakota. In contrast, the position of the petitioners appears to be one sided. It would envision the use of the courts of North Dakota by the tribes only in bringing actions. Neither the tribes nor individual Indians would be required to defend against causes of action in state court. This would deny fair play and substantial justice to non-Indian litigants with a cause of action against the tribe or an individual Indian. In sum, in order for the Indian litigants to use the state courts for their own remedy, they must also recognize that they must be willing to answer in those same courts for the remedy of others.

While Indian litigants may subject themselves, whether individually or tribally, to state civil jurisdiction, this jurisdiction will be of a limited nature. The North Dakota Supreme Court stated in its original opinion in *Wold* that the petitioners could properly bring their action in state court providing they complied with N.D.C.C. § 27-19-05.

The Court went on to state that this would subject the property of the tribes, as distinguished from the property of individual Indians, to levy and execution to the judgment of the state court.⁵ The Court's opinion appeared to suggest that both tribal and individual trust property would be subject to execution in state courts. On April 1, 1985, however, the North Dakota Supreme Court amended its opinion by adding language expressly recognizing that acceptance by the tribe of state court jurisdiction would not subject tribal or individual trust property to execution. "This will subject the property of the Tribes, as distinguished from the property of the individual Indians, to levy and execution pursuant to judgment of the state court except as such property may be exempt therefrom by appropriate state or federal law." *Three Affiliated Tribes v. Wold Engineering*, 364 N.W.2d at 104. Therefore, while the Indian litigants can take advantage of the jurisdictional offer of the State of North Dakota, they may still enjoy a measure of protection under state or federal law.

In sum, the State of North Dakota, in compliance with federal law, has given Indian litigants the opportunity of access to its courts upon their consent to state civil subject matter jurisdiction. In the interests of substantial justice and fairness Indian litigants should come before state courts on an equal footing with other citizens of North

⁵The original opinion of the North Dakota Supreme Court issued on March 13, 1985, stated as follows: "we conclude that the Affiliated Tribes in this case may properly bring their action in state court providing they comply with Section 27-19-05. This will subject the property of the Tribes, as distinguished from the property of the individual Indians, to levy and execution pursuant to judgment of the state court." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, Civil No. 10,172, slip op. at 7 (N.D. March 13, 1985).

Dakota. Upon compliance with N.D.C.C. Ch. 27-19, Indian litigants will have the benefit of using the courts of North Dakota. Therefore, the State of North Dakota would urge this Court to affirm the decision below.

CONCLUSION

The State of North Dakota respectfully requests this Court to affirm the Decision of the Supreme Court of North Dakota.

Respectfully submitted,

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